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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL,

ON APPEAL FROM THE SUPERIOR AND COUNTY
COURTS—APPEALS IN INSOLVENCY—
AND ELECTION CASES.

BY

J. STEWART TUPPER,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

CHRISTOPHER ROBINSON, Q.C.,

EDITOR.

VOL. V.

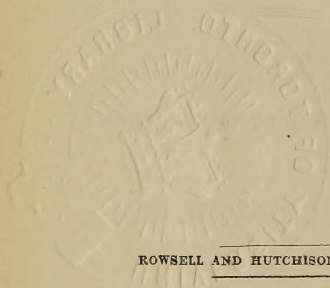
CONTAINING THE CASES DETERMINED
FROM THE 14TH JANUARY, 1880, TO THE 20TH DECEMBER, 1880,
WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

TORONTO:

ROWSELL & HUTCHISON.

1881.

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ROWSELL AND HUTCHISON, LAW PRINTERS, TORONTO.

J U D G E S
OF THE
COURT OF APPEAL
DURING THE PERIOD OF THESE REPORTS.

THE HON. THOMAS MOSS, C. J. A.

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IN THE

COURT OF APPEAL.

PARDEE V. LLOYD.

Award—Motion to set aside—Time for moving.

On the second of December, 1878, the submission being within the 9 & 10 Wm. III., the plaintiff moved to set aside an award made on the 13th of August previously, accounting for his delay on the ground that the defendant had, on the 4th of September, before the end of the next Term, served a notice on him of his intention to appeal. It was not, however, sworn that he refrained from moving owing to this notice.

Held, reversing the decision of PROUDFOOT, V. C., that the evidence did not shew that the delay was induced by the defendant, but that even if it had, it would have been no excuse for the delay, and the motion was refused.

THIS was an appeal from a decree of Proudfoot, V. C., reported 26 Gr. 375.

The plaintiff filed his bill in October, 1877, for an account and other relief in respect of transactions in mining lands, and in the construction of a railway, and for a dissolution of a partnership which he alleged had existed between him and the defendant.

The defendant filed an answer, on which issue was joined in March, 1878.

In April of that year the cause came on for hearing. A decree was then made by consent. It ordered in the first clause that proceedings in a suit of Lloyd against Pardee should be stayed, and all further proceedings carried on in this suit. 2nd. That the following matters and differences between the parties be submitted to three arbitrators named, mutually agreed upon between the parties, or any two of them, enumerating certain matters and all other

matters in difference between the parties. 3rd. General powers of the arbitrators. 4th. Time for award. 5th. Vacancies to be filled under C. L. P. Act. 6th, 7th, 8th, and 9th. Powers of arbitrators as to certain subjects of arbitration. 10th. Provided for the sale of certain properties absolutely, and certain other properties in case the arbitrators should award the same to be sold; the money to be paid into Court to the credit of the cause. 11th. Provided for the apportionment and payment out of the money. 12th. Power to arbitrators to partition mines. 13th. As to settling and execution of deed of submission.

A deed of submission was prepared, and was executed on the 29th of May, 1878. It recited the decree, and that the deed was executed in pursuance thereof, and the parties, by it, mutually covenanted to abide by the award. It also contained the usual agreement giving powers to the arbitrators to enlarge the time for making the award, and binding the parties not to obstruct the making of it; and also an agreement that the submission might be made an order of the Court of Chancery, "to the end that the parties hereto respectively may be finally concluded by the said arbitration, pursuant to the statute in such case made and provided."

The arbitrators made their award on the 13th of August, 1878; one of the three who were originally appointed having declined to act, and another having been appointed in his place.

Trinity term following began on the 26th of August and ended on the 7th of September.

It was shewn that Pardee ceased to be beneficial plaintiff before the sitting of the arbitrators, having sold his interest in the subjects of the litigation to a Mr. Bickford, who was however only made a party to the record by order of revivor on the 27th of November, 1878.

On the 2nd of December, 1878, notice was given on the part of Mr. Bickford of a motion for the following day, to set aside the award. When the motion came on to be heard before Proudfoot, V. C., it was objected to as

being too late, but the learned Vice-Chancellor held that the delay in moving was induced by the defendant, and made the order setting the award aside, which was the subject of the present appeal.

It was shewn by affidavits filed, that on the 4th of September, the defendant's solicitor had served on Mr. Bickford's solicitor a notice, styled in the cause and in the matter of the arbitration, and saying: "Take notice that the above named Henry Crampton Lloyd hereby appeals from the award of the arbitrators herein, and will, amongst other grounds, demur to the jurisdiction of the arbitrators, some or all of them, to act or make the said award."

It also appeared from an affidavit made by the defendant's solicitor, that Mr. Bickford, almost immediately after the award was made, told him he would not submit to it, but would move against it.

The case was argued on September 16th, 1879 (*a*).

McCarthy, Q. C., and *Dickson*, for the appellant. The motion to set aside the award was not made within the time limited by the statute, and the notice of the 4th of September, relied upon by the learned Vice-Chancellor, was clearly not sufficient to take the case out of the statute. There is no pretence that Bickford was misled by this notice; and his statement, both before and after it, that he would apply to set the award aside, shews that he was not lulled into inactivity by this notice. Moreover, it appears that the plaintiff did not move promptly after he had reason to believe that the defendant did not intend to move. They referred to *Ross v. Ross*, 4 D. & L. 648; *Moore v. Darley*, 1 C. B. 445; *Reynolds v. Askew*, 5 Dowl. 682; *Re Harper and Great Eastern R. W. Co.*, L. R. 20 Eq. 39; *Grand Junction R. W. Co. v. Wason*, 44 U. C. R. 203; *Rusworth v. Barron*, 3 Dowl. 317; *In re Midland R. W. Co. v. Heming*, 4 D. & L. 788; *In re Hotchkiss and Hall*, 5 P. R. 423; *Harvey v. Shelton*, 7 Beav. 455; *Emet v. Ogden*, 7 Bing. 258; *In re Perring and Keymer*, 3 Dowl.

(a) *Present*.—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

98; *Re Moyle and the City of Kingston*, 43 U. C. R. 307; *College of Christ v. Martin*, L. R. 3 Q. B. D. 16; *In re North British R. W. Co. and Trowsdale*, L. R. 1 C. P. 401; *Heming v. Swinnerton*, 1 Cooper's Chy. Cases 386; *Woodley v. Johnson*, 1 Molloy, 394; *Russell on Awards*, 652, 5th ed. *Rogers v. Dallimore*, 6 Taunt. 111; *Smith v. Blake*, 8 Dowl. 133.

H. Cameron, Q.C., and *C. Moss*, for the respondents. This being a reference by decree, the strict rule in reference to moving against the award is not applicable, as the statute only applies to the Court of Chancery by analogy; and there is, therefore, not that statutory incapacity to waive it. But the Court clearly has the power to entertain such a motion when, as in this case, the delay has been induced by the conduct of the other party. This was not a submission within the statute of William. They cited *Russell on Awards*, 5th ed., 92, 685; *Redman on Awards*, 13, 213; *Hemsworth v. Bryan*, 7 M. & G. 1009; *Rawsthorn v. Arnold*, 6 B. & C. 629; *In re Corporation of Huddlesfield*, L. R. 17 Eq. 476, 10 Chy. 92; *Rooney v. Rooney*, 29 C. P. 347; *Sherry v. Oke*, 3 Dowl. 349.

January 14th, 1880. PATTERSON, J.A.—It was objected before the learned Vice-Chancellor, and the objection has been insisted on before us, that the motion was too late, the term next after the publication of the award having been Trinity Term, which began on the 26th of August, and ended on the 7th of September.

The learned Vice-Chancellor thought the case was brought within the principle acted on in some instances in which a motion against an award had been heard after the period limited by 9 & 10 Wm. III, ch. 15, sec. 2, on the ground that the delay had been caused by the act of the party supporting the award.

The exact ground on which the learned Vice-Chancellor acted is thus stated by him in his judgment, 29 Gr. 379 :

(a) *Present*.—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

“It is quite true that the notice of appeal was defective, it does not specify the Court to which it was intended to make it, nor the time when the appeal was to be heard; but I apprehend it was quite sufficient to amount to a complaint within the statute, and to sustain a more formal notice. Bickford always intimated his intention to move against the award. Both parties seem to have been dissatisfied with it, and each knew that the other was dissatisfied. The notice of the defendant was given three days before the end of the first term after the award, and the plaintiff had then ample time to have given a notice himself. I think the necessary inference is, that he refrained because he had been served with a notice; and to save the defendant any trouble in his application, he sends him a consent in October to setting aside the award. “I think, therefore, that the plaintiff not moving in the first term after the making of the award was induced by the act of the defendant in leading him to believe that the defendant was appealing from it, and that being so, the plaintiff is not to be prejudiced by it.”

I am sorry to have to come to a different conclusion from that so arrived at, both as to the effect of the authorities and as to the case made out for indulgence. I am not pressed by any supposed harshness in the rule which limits the time for moving against an award, nor surprised at the refusal of the Court in *North British R. W. Co. and Trowsdale*, L. R. 1 C. P. 401, which is referred to by the Vice-Chancellor, to entertain the motion after the end of the term, even when both parties consented. When one bears in mind that at common law the award could not have been disturbed, but the parties were absolutely bound by the decision of the tribunal they had themselves created, and that the right to move is merely the right given by the statute, which defines the limits within which it is confined, the ground for surprise seems to be that the Courts should ever have assumed a jurisdiction beyond those limits; not that, in the case referred to, the Court of Common Pleas should have declined to add to such precedents.

I am forced to regard the case of *Midland R. W. Co. v. Heming*, 4 D. & L. 788, as rather enforcing the principle of adherence to the statutory rule, while I agree with the Vice-Chancellor that the effect of the decision was to extend the time; because what the Court did was to grant the rule *nisi* to set aside the award on the last day but one of the term in which it was proper to move; and, (the submission being then in the hands of the other party,) to grant a rule *nisi* to file the submission with the Master, in order to its being made a rule of Court, as of the day on which the motion to set aside the award was made; and to order that the rule to set aside the award should be drawn up on reading such rule; and the ground on which this exercise of jurisdiction was defended was, that the party applying had taken the initiative within the time limited by the statute.

In *Bottomley v. Buckley*, 4 D. & L. 157, the reference was not under the statute, but by order. A motion was allowed in the second term, but with the proviso that the rule if granted was to be drawn up as of the preceding term.

In *re Perring and Keymer*, 3 Dowl. 98, the reference was under the statute. Williams, J., in giving leave to move in the second term, directed that the rule, if granted, should be drawn up as of the previous term. As pointed out by the learned Vice-Chancellor, the propriety of that decision has been questioned. In refusing to follow it in *Smith v. Blake*, 8 Dowl. 133, Coleridge, J., said, "I very much doubt the power of the Court to antedate the rule."
* * I have no idea how the Court can dispense with the provisions of an Act of Parliament, though they may dispense with their own rules."

There are some cases in which the extension of time has been made without care being taken to keep the proceedings in form within the proper term. This occurred principally, I believe, if not exclusively, in cases where the reference was under a rule of Court or Judge's order, and not under a submission executed by the parties; as in

the comparatively old cases of *Anderson v. Coxeter*, 1 Str. 301; *Rogers v. Dallimore*, 6 Taunt. 111: and *Synge v. Jervoise*, 8 East 466. In the later cases the rule has generally been applied with greater strictness, even when the submission was by rule of Court or Judge's order, and only came within the statutory limitation by reason of the adoption by the Courts of that rule: *Hemsworth v. Bryan*, 7 M. & G. 1009; *Reynolds v. Askew*, 5 Dowl. 682; *Smith v. Blake*, 8 Dowl. 133; *Guadiano v. Brown*, 2 Jur. N. S. 358; *Emet v. Ogden*, 7 Bing. 258; *North British Railway Co. and Trowsdale*, L. R. 1 C. P. 401.

In *Dubois v. Medlycott*, Barnes 55, the Court made absolute a rule for an attachment for non-performance of an award, refusing to hear an objection to the award in point of law, because, the submission having been by bond, the objection, made after the first term, came too late.

But in no case, even when the relief granted was of the most indulgent character, was it extended as asked by the plaintiff here. Trinity Term ended on the 7th of September; Michaelmas Term would have ended on the 30th of November if it had not been extended to three weeks, which brought it to the 7th of December. The motion was not made till the 3rd of December, nearly the end of the second term as extended. The matter being in the Court of Chancery there was no need to delay from term to term; nor indeed would there have been at law, as a single Judge sat for the Court every week.

The periods of delay very closely resemble those which occurred in *Hemsworth v. Bryan*, 7 M. & G. 1009, and which proved an insurmountable obstacle there, notwithstanding, that the reference was only by order, afterwards made a rule of Court.

I think the reception of the motion under the circumstances was not warranted by the statute or the authorities; and even if the indulgence would have been justifiable in a proper case, I have been unable to discover sufficient grounds for it.

With great respect for the judgment of the learned Vice-Chancellor, I am unable to form the same opinion upon the materials before us as that to which he was led.

I do not draw the inference that Mr. Bickford refrained from moving because he had been served with the notice. I do not think it is a matter of inference at all. I take it to be a matter of proof. If he was misled by the notice and therefore refrained from moving, either he or his solicitor knew that, and could have told us so—not as an inference but as a fact. But they say nothing of the sort, though they both make affidavits. The solicitor mentions the receipt of the notice, but apparently for another purpose, viz., as a foundation for the point made in the notice of motion against the award, by connecting the notice of the 4th of September with a counter notice served on the 8th of October, agreeing to the award being set aside. If the affidavits had advanced this notice of appeal as a reason why the plaintiff had delayed, I think the answer given to a contention similar to this, though made on somewhat stronger facts, in *Emet v. Ogden*, 7 Bing. 258, would have been appropriate. It was there said, “He ought not to have relied on the defendant, but to have proceeded himself; the application is too late, and no sufficient reason has been assigned for the delay.” And, having regard to the long delay which occurred after the end of Trinity Term, when the plaintiff must have known that the defendant was not moving, if it had now been sworn that the first delay was caused by the conduct of the defendant, I should have felt inclined to treat the matter a good deal as the application was treated in *Guadiano v. Brown*, 2 Jur. 358. The motion there was made in the second term after the award. The excuse was the ill health and consequent absence of the plaintiff. Pollock, C. B., said: “No doubt Courts of appeal are essential to the due administration of justice; but they are all accessible only on certain terms, one of which is, that generally speaking the appeal shall be brought within a specified period. Here the questions in dispute between the parties have been submitted to judges of their own

choosing, viz., two arbitrators, and they had a right within a limited period of appealing from their decision, which period has been allowed to go by; and I cannot distinguish the case from those where there has been delay in bringing a writ of error, or in moving for a new trial. The rule in question will not be relaxed except a case of fraud can be made out, with which the Court knows how to deal whenever it is satisfactorily established." Bramwell, B., said: "Even if the plaintiff had sworn that during Michaelmas Term he was too ill to be consulted on the matter, I do not think a sufficient explanation of the delay would be made out; and if he had sworn that I should not have believed him."

Looking at this case in the light of the materials on which the application is made, we are asked to say that the delay of three months beyond the time limited by the statute may be condoned, not because the defendant induced the plaintiff to abstain from moving at the proper time; nor because the plaintiff delayed in expectation that the defendant would move; nor even that the plaintiff for a moment supposed that the defendant meant to move; but simply because the defendant served a notice saying that he appealed. We are asked in effect to lay down a rule that the service of such a notice extends indefinitely the time fixed by the statute. We cannot do so without venturing upon dangerous ground.

Moss, C. J. A.—Three propositions are, I think, established at the threshold of this appeal. First, that notwithstanding the agreement to refer was originally embodied in a consent decree, the submission by which the rights of the parties were subsequently governed was the sealed instrument which they executed. Secondly, that the right to move against the award was dependent upon the statute of 9 & 10 Wm. III. Thirdly, that the motion was not actually made until near the end of the second term after publication. It is clear from the judgment of the learned Vice-Chancellor, that these propositions

received his full assent. It cannot be doubted that (*prima facie* at least) the party aggrieved was therefore bound to move against the award before the last day of the term following publication. The statute in relaxing the rule of the common law, which precluded enquiry into the conduct of the judges to whom a person had voluntarily intrusted the determination of his rights, had annexed as a condition of this indulgence that the complaint should be made within a specified time. While it was not unnatural for the Courts to manifest an anxiety to extend this period, where the delay had arisen from causes for which the party was not responsible, and where the refusal to entertain the motion seemed to shut the door upon justice, it seems to me to be impossible to state any sound juridical principle upon which such a jurisdiction could be assumed. If advantage was not taken of the salutary provision of the statute within the prescribed period, the rigid rule of the common law remained in full vigor. Where from any cause short of the fraudulent contrivance of the other party, no complaint had been made within the limited time, the right to maintain the award in spite of objections which could only have been taken by the aid of the statute, would appear to me to be absolutely vested. Even in cases which seem opposed to this view, the attempt really was by moulding the procedure to preserve the form of compliance with the statute, while enlarging its operation. But the later authorities, and notably the refusal of the Court in *North British R. W. Co. and Trowsdale*, L. R. 1 C. P. 401, to entertain such a motion, even upon consent, affirm the soundness of the doctrine which I have attempted to enunciate.

The Vice-Chancellor did not fail to notice these authorities, but he thought that the facts of this case left him at liberty to extend the time, upon the authority of *Midland R. W. Co. v. Heming*, 4 D. & L. 788, where the Court had in effect permitted the motion to be heard in the following term, on the the ground that the submission, which it was necessary to make a rule of Court, was

withheld by the party sustaining the award, and that the other had good reason to believe that it was intended to make it a rule of Court. As I understand by his judgment, he thought that this established the principle that where a person is induced to refrain from moving by the act of the opposite party in leading him to believe that he intended to appeal to the Court, his complaint may be heard after the statutory time has elapsed. Upon this view two observations suggest themselves. The first is, that in the case relied upon the complaint was made in due time, and the only obstacle was the absence of some of the materials which the practice had prescribed as necessary to success. It may be that there was nothing very extraordinary in the Court allowing the case to be supplemented by the production of what was wanting. This important element does not appear in the case under consideration. The second is, that there does not appear to be evidence that any act of the defendant either ought to have induced or did induce the plaintiff to refrain from proceeding in the regular course. All that was done was, to serve an extremely informal and not very intelligible notice upon the plaintiff, that the defendant thereby appealed from the award, and would, amongst other grounds, demur to the jurisdiction of the arbitrators. The point aimed at in this description of the defendant's objection is outside the realm of the most fanciful conjecture I have been able to construct. But even if the plaintiff understood its occult significance, there is no proof that it misled him or lulled him into inactivity. It is only referred to as an incident in the narrative of what had taken place. Neither the respondent, nor his solicitor, has pledged his oath to the statement that it operated to prevent any action on his part. If such an assertion had been made, it would in my judgment have been effectually met by the reasonable observations in *Emet v. Ogden*, 7 Bing. 258, that the plaintiff was not justified in relying upon the defendant, but ought to have proceeded himself.

On the whole I am clearly of opinion that the learned

Judge had no jurisdiction to set aside the award after so long a delay, accounted for, if at all, upon such unsatisfactory grounds. I fully sympathize with his desire to entertain the motion, because I share his feeling that the conduct of the arbitrator, whose action is impeached, was, if not absolutely illegal, a departure from that nicely impartial course which ought to distinguish the conduct of a man entrusted with judicial functions.

The rule prohibiting an arbitrator from holding secret communications, however innocently meant, with one of the litigants, cannot well be made too stringent. But the same rule as, in my opinion, precluded the learned Vice-Chancellor from giving effect to this objection to the award when he did, makes it proper for me to refrain from going further than making this general observation.

I think the appeal must be allowed, with costs, and the motion in the Court below dismissed, with costs.

BURTON and MORRISON, JJ.A., concurred.

Appeal allowed.

NORVALL V. CANADA SOUTHERN RAILWAY CO.

Award—Specific performance of—Misconduct of arbitrators—Right of review under 38 Vic., ch. 15, O.

Held, affirming the decree of PROUDFOOT, V. C., that the plaintiff was entitled to specific performance of an award giving him damages for his lands taken by the defendants; that the sum awarded was not so excessive as to shew any fraudulent or improper conduct on the part of the arbitrators; and, *Quære*, whether, if shewn, it would be a defence in such a proceeding.

Quære, also, the land having been taken under an Act of the Dominion Parliament, whether the finding of the arbitrators could be reviewed under the Statute of Ontario, 38 Vic., ch. 15, O.

THE plaintiff filed his bill for specific performance of an award giving him compensation for the damage sustained by the expropriation of a portion of his land. By their answer the defendants alleged that the amount awarded was excessively and fraudulently exorbitant, and that the award was made by the fraud, covin, and misrepresentation of the plaintiff and the two arbitrators who concurred therein. It was also alleged that the award was void upon the ground of mistake by the arbitrators in basing their estimate upon the assumption that the whole of the plaintiff's frontage had been taken by the defendants.

It appeared that before this bill was filed the defendants had presented a petition to the Court of Queen's Bench, under the 38 Vic., ch. 15, O., to set aside or reduce the award. Harrison, C. J., before whom the petition was heard, held that there was sufficient evidence to sustain the award, and dismissed the petition. Thereupon the defendants appealed to the Court of Appeal, who held they had no jurisdiction to entertain an appeal from the decision of the learned Chief Justice, whose judgment was final.

The case came on to be heard at the Sandwich sittings in the autumn of 1878, before Proudfoot, V. C., when a decree was made declaring that the plaintiff was entitled to specific performance of the award.

The defendants appealed.

The case was argued on the 10th of March, 1879 (a).

Crooks, Q. C., and *Cattanach*, for the appellants. The learned Vice-Chancellor should have held that the award was void *in toto*, as the amount awarded by the arbitrators is so excessive as to shock the conscience, and clearly shews that the arbitrators were guilty of fraud, or acted under a mistake as to the subject matter of the award: *Widder v. Buffalo & Lake Huron R. W. Co.*, 24 U. C. R. 520, 536; *Achsenbein v. Papelier*, L. R. 8 Chy. App. 698; *Great Western R W Co. v. Warner*, 9 Gr. 506; *Grant v. Eastwood*, 22 Gr. 563; *Smith v. Whitmore*, 2 DeG. J. & S. 297, 310; *In re Dare Valley R. W. Co.*, L. R. 6 Eq. 435. It is objected that the matter in question is *res judicata* by the judgment of Harrison, C. J., but such a contention is not tenable, as there the appellants only sought to obtain a review of the evidence; but the questions now in issue are quite different. They also cited *Tredigar v. Windus*, L. R. 19 Eq. 615; *Davis v. Hedges*, L. R. 6 Q. B. 687; *Moss v. Anglo-Egyptian Navigation Co.*, L. R. 1 Ch. 108.

Blake, Q. C., and *Boyd*, Q. C., for the respondent. This case is clearly *res judicata*, as the whole question was fully discussed on the petition of the appellants to the Court of Queen's Bench. All the points relied upon to-day were susceptible of being taken on the hearing of the petition and finally adjudicated upon, and the matter is not the less *res judicata* because the appellants abstained from raising them. The largeness of the amount arrived at by the arbitrators is not sufficient to set aside the award, except fraud or mistake is shewn; and we submit that the evidence wholly fails to sustain any such contention. It is absurd to argue on the evidence that the arbitrators did not understand the subject matter. They cited *Mason v. Stokes Bay R. W. Co.*, 32 L. J. Chy. 110; *Collier v. Mason*, 25 Beav. 200; *Weekes v. Gallard*, 21 L. T. N. S. 655; *Lloyd on Compensation*, 99; *Morrison v. Mayor of Montreal*, L. R. 3 App. 148; *Henning v. Twinnerton*, 2 Phil. 79; *Re Harper*, L. R. 18 Eq. 539; *Commings v. Scott*,

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L. R. 20 Eq. 11; *Regent's Canal Co. v. Ware*, 23 Beav. 579; *Moseley v. Simpson*, L. R. 16 Eq. 226; *Re Hopper*, L. R. 2 Q. B. 367; *Burr v. Gamble*, 4 Gr. 426.

Crooks, Q.C., in reply. It is not objected on the pleadings that this question is *res judicata*. He cited 2 Sm. L. C., 6th ed, 794, 795, 796.

January 14, 1880. Moss, C. J. A., delivered the judgment of the Court.

The questions upon this appeal are, whether the defences sought to be raised are open upon this record, and if so, whether they are supported by the evidence.

It was conceded by Mr. Crooks at the opening of his very full and able argument, that it was not now open to him to impeach the award on the mere ground that the damages were unreasonably large or excessive, or even upon the ground that there had been such impropriety or misconduct by the arbitrators as would have warranted the interference of the Court upon a motion to set aside the award. The position he assumed was that the award was void *in toto*; and that the evidence shewed the amount to be so entirely disproportionate to any loss the plaintiff could possibly have suffered and so grossly exorbitant as to shock the conscience, and to lead to the inference either that the arbitrators had been guilty of fraud, or had made a mistake by including something which was not a proper subject of compensation, or had made the valuation upon a wholly erroneous principle.

There is really no reason for the contention that the arbitrators were under any mistake as to the subject matter of the award. They were perfectly familiar with the property of the plaintiff, and they knew exactly what the defendants had taken.

I was at first under the impression that there might be ground for inferring that they had proceeded upon an erroneous principle. An affidavit made by Mr. Rankin, one of the arbitrators, upon a petition for a review of the award,

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heard by the late Chief Justice of the Queen's Bench, seemed to lend some colour to this argument ; but a perusal of the evidence, and an examination of the plan produced, have satisfied me that this ground of attack, even if now available, has not been established.

We have, therefore, to consider whether even if the arbitrators' conduct were fraudulent that defence is open to the defendants in this proceeding. All the cases to which we were referred were those of motions to set aside the award, in which it is well known that the courts exercise a large discretion, for the purpose of attaining justice. I have not found any case in which fraudulent, improper, or malignant conduct, on the part of the arbitrators alone, without any collusion with the person seeking to enforce the award, has been set up by way of defence to an action upon the award. The misconduct of the arbitrators alone, however gross or fraudulent, seems to have been only ground for an application to the equitable jurisdiction of the Court. In *Brad-dick v. Thomson*, 8 Ex. 344, Lord Ellenborough put an inquiry which seems to go the root of the matter : "How can the injustice of the arbitrator be pleaded against one of the parties without at least implicating him in it ?"

In *Whitmore v. Smith*, 7 H. & N. 509, Willes, J., by whom the judgment of the Exchequer Chamber was pronounced, explains very distinctly the grounds for requiring misconduct by an arbitrator to be made the subject of a motion and not of a plea. In *Thorburn v. Barnes*, L. R. 2 C. P. 384, it was held that such a defence could not be pleaded. The point was succinctly put by Keating J., p. 404 : "In truth the whole question resolves itself into this, was that which is relied upon misconduct by the arbitrators ? If it was it can only be taken advantage of by motion, and not by plea." It is not necessary to consider now the question whether collusion between the party so supporting the award and the arbitrators would make any difference in this rule, because there is no ground for arguing that this had in fact been proved. In the well known case of *Widder v. Buffalo & Lake Huron R. W.*

Co., 24 U. C. R. 520, and in Appeal, 27 U. C. R. 425; the Court, in an action upon an award, felt at liberty to consider the exorbitancy of the amount awarded as a ground of defence. That case was peculiar in its circumstances, and it is noteworthy that the defendants by their plea alleged that the award was made by the fraud, covin, and misrepresentation of the plaintiff. I think, however, that there is no escape from the conclusion that the case was discussed by the learned Judges, who pronounced opinions in appeal, as if fraudulent misconduct by the arbitrators were in itself a defence to the action. I have referred to these decisions of courts of law because this bill is in effect an action to recover the amount of the award, and it may be questionable whether it would have been entertained before the Administration of Justice Act gave the Court of Chancery jurisdiction to enforce payment of mere money demands founded upon a legal right.

The general rule in equity was, that a bill would lie to enforce specific performance of an award, where the thing awarded to be done was such that a Court of Equity would have compelled its performance *in specie* if agreed to by the parties themselves. The parties having agreed to act according to the arbitrator's directions, his decision is tantamount to an agreement upon the terms he lays down. But it does not follow that the Court extends to an award the same liberal jurisdiction, which it exercises in the case of an ordinary agreement, of refusing to compel specific performance on the ground of the harshness or unreasonableness of the terms. In *Wood v. Griffith*, 1 Swanst. 43, Lord Eldon held that the objection of unreasonableness could not be sustained, but he seems to have proceeded upon the ground that the parties must abide by the decision of the domestic tribunal they had themselves chosen; and it may be, as I shall presently explain, that that principle is not applicable here. That decision was commented upon by Lord Justice Turner, in *Nickels v. Hancock*, 7 D. M. & G. 300. While that learned Judge was perhaps prepared to agree that the arbitrators' judgment should be final,

when it was a fair subject of discussion and consideration whether one course or another was the right one, he intimated an opinion that the objection of unreasonableness ought to prevail where the judgment of the arbitrator went the length of destroying the right of one of the parties, though the parties had never authorized him to decide that any one of them had no right, but only agreed that he should determine the mode in which their rights and interests should be regulated.

The general doctrine I take to be established by the cases is that the Court will not refuse specific performance on the ground that the price fixed was unreasonable. In a case which seems to present some analogy, *Collier v. Mason*, 25 Beav. 200, it was observed by the Master of the Rolls, in giving judgment, p. 204: "It does appear to me a very high and perhaps an exorbitant valuation, but I cannot say it amounts to evidence of fraud, mistake, or miscarriage. * * Here the referee has fixed a price, which is said to be evidence of miscarriage, but this Court, upon the principle laid down by Lord Eldon, must act on that valuation, unless there be proof of some mistake or some improper motive, I do not say a fraudulent one; as if the valuer had valued something not included, or had valued it on a wholly erroneous principle, or had desired to injure one of the parties to the contract, or even, in the absence of any proof of any one of these things, if the price were so excessive or so small as only to be explainable by reference to some such cause." But that case is no authority for the proposition that any of the grounds mentioned can necessarily be set up by way of answer to a bill for the enforcement of the award. It was a case of an agreement to sell at a price to be named by another, and where the arrangement virtually was that the referee should exercise his judgment upon a mere view of the premises. Such cases appear to be very distinguishable from one like the present, where the defendants have, by virtue of the powers conferred upon them by the Act of Parliament, taken possession of the land of the plaintiff, who is com-

pelled to accept such price as arbitrators may choose to give.

But it does not seem to be necessary to pursue this enquiry further, because I do not think that the evidence establishes any such case of misconduct on the part of the arbitrators as would render it proper to set aside this award, much less to hold it to be a complete nullity. The price awarded may strike us as enormous, but there was evidence which would have warranted the arbitrators in honestly giving the plaintiff so large a compensation. The amount, therefore, does not in itself point to the presence or operation of a corrupt motive or intention on the part of the arbitrators. The charge that they proceeded upon a wrong principle, or included in their estimate matters not the subject of compensation, is not supported by the evidence. That of collusion between the plaintiff and the arbitrators wholly fails.

There is only one other point to which it seems necessary to refer. It was strenuously argued that the questions in controversy became *res judicatæ* by the decision of the Chief Justice of the Queen's Bench. I incline to think that the learned Judge had no power to review the finding of the arbitrators upon a petition presented under the Act of the Ontario Legislature, 38 Vic., ch. 15. These lands were, as I understand, expropriated under the authority of the Act of the Dominion, by which a new charter was in effect granted to these defendants; and it admits of grave question whether an Act of the Ontario Legislature could extend to or affect proceedings so taken. I content myself, however, with directing attention to this point. In the view that we take of the points discussed, and in the absence of argument, which might throw an entirely different light upon this question, it would not be proper to express any positive opinion.

I think the appeal must be dismissed, with costs.

Appeal dismissed.

MORTON V. NIHAN ET AL.

Insolvent Act of 1875—Fraudulent mortgage—Evidence—Burden of proof.

The bill was filed by the assignee in insolvency of one T., to set aside a mortgage given by him shortly before his insolvency, alleging that the defendant T. N., who was endorser of a note for \$2,000 made by T., procured the mortgage in question for that amount to be made in the name of his brother J. N., and that he gave J. N., the \$2,000 with which the note was retired. T. N. swore that he paid J. N. the money in discharge of a debt due by him to J. N. and P. N., another brother. J. N. also swore that the mortgage moneys belonged to him and P. N., but their evidence was uncorroborated, and P. N. was not called.

Held, reversing the decree of PROUDFOOT, V. C., that under the suspicious circumstances which surrounded this case, the *onus* was wholly upon the defendants, to prove not only that a debt was due from T. N. to J. N. and P. N., but that the money received by them in payment thereof had been honestly advanced to T. on the security of the impeached mortgage, which the evidence, more fully set out below, failed to establish.

The rule laid down in *Merchants' Bank v. Clarke*, 18 Gr. 594—that transactions of this kind should not be held sufficiently established by the uncorroborated testimony of the parties thereto—approved of.

THIS was an appeal from the decree of Proudfoot, V. C., dismissing the plaintiff's bill.

The plaintiff, who was the assignee in insolvency of John Titterington, filed his bill on the 19th day of November, 1878, alleging that shortly before the insolvency, which occurred on the 22nd of June, 1878, the defendant Thomas Nihan, who was liable as endorser on a note of the insolvent's for \$2,000, knowing the embarrassed circumstances of Titterington, and that his insolvency was imminent, devised a fraudulent scheme to procure payment of the note, and relieve himself from his liability thereon: that in pursuance of this scheme the said Thomas Nihan procured a mortgage to be made for \$2,000 on real estate of the insolvent, in the name of his brother and co-defendant John Nihan, and then handed the money to his said brother, who retired the note before maturity. The plaintiff alleged that the mortgage was Thomas Nihan's mortgage, though taken in his brother's name, and was fraudulent and void as against the creditors of the insolvent, and prayed that it should be set aside and cancelled.

The defendant Thomas Nihan by his answer set up that the moneys advanced on the mortgage, and applied in payment of the note, were the moneys of his brothers, John Nihan and Patrick Nihan: that he was an accommodation endorser of the note, and that shortly before it became due the insolvent applied to him for an advance of \$2,000 to enable him to pay the note: that he refused to make the advance, but applied to his brother John Nihan to do so, and that John Nihan agreed to advance the money if Thomas would pay him \$2,000 on account of an alleged indebtedness existing between Thomas and his brothers John and Patrick. He further alleged that he paid the \$2,000 to John on account of such alleged indebtedness, and that John then advanced the said sum to the insolvent on the security of the mortgage.

In his answer John Nihan alleged that the moneys advanced on the mortgage were the property of himself and his brother Patrick, and that he held the security in trust for himself and his said brother.

Both defendants denied that they knew, or had any reason to know or believe, that Titterington was in embarrassed circumstances or contemplated insolvency, and denied all charges of fraud imputed to them by the said bill.

The note in question was dated the 8th day of February, 1878, and became due on the 11th day of June, 1878. On the 30th day of May, 1878, the mortgage was executed, and on the same day a cheque for \$2,000 was given by Thomas Nihan to John Nihan, who cashed the same, and handed the proceeds to his solicitor, who paid the note therewith. The writ of attachment in insolvency was issued on the 22nd day of June following.

The case was heard at the St. Catharines sittings, in the autumn of 1879.

W. Cassels for the plaintiff.

James Maclellan, Q.C., for the defendants.

The following judgment was given at the hearing by

PROUDFOOT, V.C.—I have had a great deal of difficulty in coming to any conclusion upon the evidence that has been given to-day upon the different points that have been discussed.

There is no doubt that Thomas had a very strong interest in shewing that there was a debt due from him to John and Patrick, because it was only through the operation of that debt that he was to be relieved from his responsibility as endorser upon the note which was in the bank and made by the insolvent.

There is then the fact that there seems to have been no books kept by these parties. Thomas kept no books shewing the amount due to him, and John kept no books—no proper books, for practically the books produced are but memoranda of the amounts that they had advanced to Thomas, or were due by Thomas.

There is also the fact that these are all relatives—all brothers; but, in opposition to all that there is the sworn evidence of the two brothers of the existence of this debt. There are many circumstances which might have been displaced by the plaintiff had he chosen to do so, or were the facts such as to warrant him in shewing that that evidence was incorrect. If there had been no arbitration—had there been no sum due from the Government—had the money not been paid Patrick, or Patrick not paid it to Thomas—all these circumstances would have gone to shew the incorrectness of the evidence given to-day. But none of them have been touched, and the only, and I must admit it is a very suspicious circumstance, is that the defendants have not chosen to call Patrick, and I think that one side or the other ought to have called him, because it places me in very great uncertainty as to what conclusion ought to be arrived at; but I cannot say that the *onus* in that case was upon the defendants. They have proved by two witnesses the existence of a debt, and if plaintiff hoped by the examination of Patrick to shew that there was no such debt, then he might have called him; but there is the

evidence of the two to having the debt, and I do not know that I am at liberty to disregard it upon the ground merely of the improbability of some of the circumstances, and the relationship that may be existing between the parties. I think I must take it that there was a debt established due from Thomas to these two brothers John and Patrick, and that the money, consequently, that was advanced to the insolvent was the money of the brothers.

There is also the suspicious circumstance that the mortgage was taken to John alone; but I do not think that is of very much weight. John says, that he is a trustee for himself and Patrick, and I apprehend that Patrick can always get the benefit of that if he chooses to enforce it.

There is also the evidence too that Patrick did assent to this arrangement, and that he approved of it, and that he sanctioned the mortgage being taken in that way. I think Thomas swore to that, and it is not disproved.

Then supposing this money to have been advanced by John and Patrick—people who were not creditors of the insolvent—*bonâ fide* for the purpose of enabling the insolvent either to carry on his business or to pay off his debts, I do not think that there is anything shewn here sufficient to deprive him of the right of reeovering this money. I do not think that the security is void in their hands.

I think that the plaintiff's bill as to both of the points must fail. The fact of whether John had notice or not seems to be of very little importance, because even if he had notice still I think that the plaintiff could only set aside the security upon repaying the money advanced. He does not offer this by his bill, and not offering to do it I do not see that there is any relief that can be given to him.

I think upon the whole case, but after a great deal of hesitation—I must say a great deal of hesitation, probably caused by one side or the other not calling Patrick, and the uncertain way in which the books have been kept—I think upon the whole that the evidence does establish the existence of a debt from Thomas to John and Patrick, and that

these people are entitled to hold their security ; and therefore that the bill must be dismissed, without costs though, because I think the circumstances are suspicious enough to have justified the filing of the bill by the assignee, and to justify inquiry in a Court where he himself would not be the Judge.

The plaintiff appealed.

The case was argued on the 27th of January, 1880 (a).

W. Cassels and *Gregory Cox* for the appellant.

James MacLennan, Q.C., for the respondents.

The following cases were cited for the appellant : *Nelles v. Paul*, 4 App. R. 1 ; *Evans v. Ross*, 30 C. P. 121 ; *Rice v. Bryant*, 4 App. R. 542 ; *Merchants' Bank v. Clarke*, 18 Gr. 594.

March 2, 1880. Moss, C. J. A.—The defendant Thomas Nihan was an endorser upon a promissory note for \$2,000, made by John Titterington, of whose estate the plaintiff is assignee in insolvency. He is called an accommodation endorser, but this perhaps does not describe his position with entire accuracy, for he procured the note to be discounted at his own bank, and the proceeds having been passed to his credit, he paid the amount to King, the partner of Titterington. I infer from the evidence that the latter was not aware, until shortly before the transactions now in question, of Thomas Nihan's connection with this note. But, however this may be, it is certain that on the 30th of May, 1878, the note was lying at the defendant's bank, and was to become due on the 11th of June. Whether or not both the defendants were aware of the fact—a question to which I shall refer presently—it is, I think, beyond doubt that Titterington was on the 30th May hopelessly insolvent. He had been speculating largely in the Chicago produce market with the usual result, and although he may have cherished a visionary hope that

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fortune's wheel might yet turn in his favour, his real prospects were worse than those of a gambler making his last throw. The learned Vice-Chancellor did not find whether the defendants had notice of the insolvency. He was of opinion that it was not very important to determine whether John had notice. In my judgment the evidence leaves it beyond reasonable doubt that Thomas had full notice, and as he was the real actor in the transaction, John having taken scarcely any part in it personally, and being represented throughout by his brother, this notice might probably be imputed to John. But as will presently appear, I concur in the opinion that the question of notice is not very material, at least beyond the extent to which it may furnish an index to the motives of the defendants.

This being the position of affairs, we find that on the 30th of May, Titterington gave John Nihan a mortgage upon freehold property purporting to secure repayment of two thousand dollars and interest. The plaintiff's contention is that this instrument was the result of a fraudulent scheme devised by Thomas Nihan to extricate himself from liability upon the promissory note, and that John Nihan's name was used to divert suspicion. The defendants on the other hand assert that the money was advanced to Titterington, and that it belonged to John and Patrick Nihan jointly, and that Thomas had no interest in it or the mortgage. In his answer Thomas states that the insolvent applied to him to advance the \$2,000 on the security of a mortgage on the lands in question to enable him to pay the note, but that he refused to comply with this request, and offered to endeavour to procure an advance for him for that purpose. As the money which was used to retire the note was actually furnished by Thomas, there is no obvious reason for this rejection of Titterington's proposal, if Thomas's professions of confidence in his solvency are well-founded. Both the defendants expressly allege that the money was advanced to Titterington. The defendant John Nihan has introduced into his answer a statement, which strikes me as very suggestive,

that he was not aware that his brother had endorsed the promissory note, or that the money was to be applied in paying it, or in payment of any claim against Titterington for which Thomas was in any way liable.

There need be no difficulty in accepting this as literally true, if we believe that John knew little or nothing of any part of the transaction, and was a mere instrument in the hands of his brother, but upon any other theory it seems to make large demands upon our credulity. Titterington never saw John or spoke to him with reference to the matter; and all the information that John got confessedly came from his brother. Not one farthing of the money was allowed to reach the hands of Titterington. Thomas gave a cheque for the amount to John, who drew the money in bank notes, and handed it to the solicitor of Thomas, by whom it was used to retire the note at once without waiting until it became due, or asking any rebate of interest. If it were proper to view the transaction in the light of these facts only, its complexion would not be doubtful. No man of plain understanding would hesitate to pronounce it a transparent and somewhat clumsy contrivance for giving Thomas, who was really, if not technically, a creditor, a preference over other creditors. But the defendants seek to avoid this consequence by setting up that Thomas was indebted to John and Patrick in a sum exceeding \$2,000, and that the money was advanced by them on their own account. The learned Judge thought that he must take it that there was a debt established to be due from Thomas to his brothers, and that the money that was advanced was consequently that of the brothers. He is reported to have made the following observations in delivering judgment:

“There is also the fact that these are all relatives—all brothers; but, in opposition to all that, there is the sworn evidence of the two brothers of the existence of this debt. There are many circumstances which might have been displaced by the plaintiff had he chosen to do so, or were the facts such as to warrant him in shewing that that evidence

was incorrect. If there had been no arbitration—had there been no sum due from the Government—had the money not been paid Patrick, or Patrick not paid it to Thomas—all these circumstances would have gone to shew the incorrectness of the evidence given to-day. But none of them have been touched, and the only, and I must admit it is a very suspicious circumstance, is, that the defendants have not chosen to call Patrick, and I think that one side or the other ought to have called him, because it places me in very great uncertainty as to what conclusion ought to be arrived at; but I cannot say that the *onus* in that case was upon the defendants. They have proved by two witnesses the existence of a debt, and if the plaintiff hoped by the examination of Patrick to shew that there was no such debt, then he might have called him; but there is the evidence of the two to having the debt, and I do not know that I am at liberty to disregard it upon the ground merely of the improbability of some of the circumstances, and the relationship that may be existing between the parties.”

I have cited this passage at length, because it seems to be the foundation of the decree against which this appeal is brought. It is unnecessary for me to say that I have the sincerest respect for any opinion which the learned Vice-Chancellor may pronounce, but I am quite unable to concur in this mode of treating the question. I cannot entertain a doubt that the *onus* was wholly upon the defendants. It was under the circumstances incumbent upon them to establish with such certainty as to satisfy the judicial mind, not only that a debt existed, but that money received by them in payment thereof, had been honestly advanced to Titterington upon the security of the impeached mortgage. The circumstances to which I have already directed attention were quite sufficient to have imposed upon the defendants the burden of making out the case, but it is easy to add others of equal weight and significance. We all think that it is quite certain that the transaction would never have been put in its pre-

sent shape, if the solicitor of Thomas had not so advised. But for his suggestion Thomas would have retired the note, and taken the mortgage to himself. His account is, that Thomas spoke to him about an advance being made to Titterington to pay the note, and that he told him not to advance the money himself, but if he could get any other person to do so to get the advance in that way. This was not denied by Thomas, who admitted indeed that he acted upon the advice of the solicitor. The instructions to prepare the mortgage were given by Thomas, and John was not even informed that such a proceeding was in contemplation until the previous evening. There is not the least reason to suppose that Patrick ever heard of it until after it was consummated. Again, the mortgage was retained by the solicitor of Thomas, and afterwards handed to him, and not to John.

We think that the learned Vice-Chancellor gave too little weight to the circumstance that the defendants were brothers, who were seeking to establish this admittedly suspicious defence by their own statements, uncorroborated by other testimony, either oral or written.

The rule laid down in *Merchants' Bank v. Clarke*, 18 Gr. 594, even if not of universal application, is in general a safe and judicious one to be observed. Indeed, we venture to think that this very case indicates its soundness and propriety, for it seems to us that public policy required that a structure which bore so suspicious an appearance of fraudulent origin, should be supported by some better and further evidence than that of the suspected parties. We are also unable to concur in the view that the plaintiff is to suffer from the non-production of Patrick. In our opinion the defendants did not shift the onus by their own statements, and they required all the help that Patrick could give.

When the evidence in proof of the alleged debt is examined it appears to us to completely fail. There is no reason to doubt that originally there was no intention of setting up that Patrick had any interest in the money. If

there had been, the mortgage would have been made to him and John jointly, and even the confidence which these brothers repose in each other would not have led to his money being thus invested without his leave. The introduction of Patrick's name bears every appearance of an afterthought, originated when it became plain that no stretching of figures could make John appear a creditor for the requisite amount. Upon his own evidence, and giving him the full benefit of every statement, he could not make up a claim of \$500.

Thomas has no book which contains any entries of transactions between him and his brothers, and although John produced a book upon his examination before the assignee in insolvency, Thomas knew nothing of its existence or contents. The original statement made by John was, that it contained entries relating to their dealings, but that these had been torn out,—when he could not tell,—but the entries amounted to about \$450. At the trial the same book is produced, and it is said then to have contained items relating to the alleged debt, but amounting to a much smaller sum. It is also charged that these entries were manifestly made at the same time, but the book through some mistake was not before us upon the argument, and we are bound to disregard this charge. Thomas speaks of a sum of \$3,500, which he received from the Dominion Government as compensation for certain land which belonged to him and John jointly, and in this way he attempts to make up the claim of \$2,000, but it seems to be quite clear that this money was not received until some time after the transaction in question. Further analysis of the evidence only confirms the opinion that the defence wholly failed, and we cannot but think that the learned Judge would have been of the same opinion, if he had not taken so favorable a view of the defendants' position with respect to the burden of proof.

In dealing with this appeal we are not embarrassed with various considerations which might have arisen, if the learned Judge had, upon hearing the defendants, formed

an unhesitating opinion upon their testimony, while recognizing the burden of proof which they ought to sustain.

In our opinion the appeal should be allowed, with costs; and the usual decree made in the Court below with costs.

BLAKE, V. C.—I concur in the judgment of the Chief Justice of this Court. As the learned Judge who tried the cause was not satisfied with the evidence, and came to the conclusion at which he arrived “after a great deal of hesitation,” I do not think we are precluded from finding for the plaintiff, as we would be had the evidence been entirely satisfactory to the mind of the Judge in the Court below as to the *bona fides* of the transaction. I have only to add that I think it a circumstance of suspicion that they should have so ostentatiously paraded the second mortgage, but when it came to the reality of the transaction nothing was advanced, except on the mortgage that was to be made the means of retiring the note which was troubling the endorser. I believe this was a part of the general scheme which was to aid in cloaking that which, with all the care used, is, to my mind, a very apparent fraud.

PATTERSON and MORRISON, JJ.A., concurred.

Appeal allowed.

CROSS V. CURRIE ET AL.

Promissory note—Accommodation endorser—Innocent holder.

B. endorsed a promissory note made by C. for the purpose of retiring another similar note which he had previously endorsed for C.'s accommodation, and gave it to C. Instead of retiring this note, however, C. handed it to the plaintiff in payment of a debt, who took it in good faith, but made no inquiry respecting C.'s title to the note or his authority so to deal with it.

Held, affirming the judgment of the Queen's Bench, 43 U. C. R. 599, that the plaintiff was entitled to recover against B.

APPEAL from the judgment of the Court of Queen's Bench, making absolute a rule *nisi* to enter a verdict for the plaintiff.

This was an action on a promissory note made by Currie, payable to the order of defendant Brown, and indorsed by Brown. It was endorsed by Brown and entrusted by him to Currie, for the purpose of being used by Currie to retire another note which Brown had endorsed for Currie's accommodation. While it was still in Currie's possession, Currie was pressed by the plaintiff for a debt due to him, and handed him this note, which the plaintiff received on account of his debt, making no inquiry respecting Currie's title to the note, or his authority so to deal with it. The Court of Queen's Bench held that the plaintiff was entitled to recover against Brown. The case is reported in 43 U. C. R. 599, where the pleadings and facts are fully stated. The defendant Brown appealed.

The case was argued on the 2nd of March, 1879 (a).

Bethune, Q. C., and *Ewart*, for the appellants. The appellant never endorsed or delivered the promissory note sued on to the plaintiff, and never authorized any other person to do so: *Foster v. MacKinnon*, L. R. 4 C. P. 704; *Austin v. Farmer*, 30 U. C. R. 10; *Bell v. Lord Ingestre*, 12 Q. B. 317; *Denton v. Peters*, L. R. 5 Q. B. 475. The note was delivered to Currie, the maker, for a specified

(a) *Present*.—MOSS, C.J.A., PATTERSON and MORRISON, JJ.A., and BLAKE, V.C.

purpose, and he had no authority to use the note for any other purpose. It cannot be contended that the respondent was an innocent holder of the note for value as the evidence shews that he knew that this note was made by Brown for Currie's accommodation, and he is bound by all the equities existing between Currie and the appellant. They cited *Ianson v. Paxton*, 22 C. P. 505; *Hogg v. Skeen*, 18 C. B. N. S. 426; *Young v. Austen*, L. R. 4 C. P. 553; *Halcrow v. Kelly*, 28 C. P. 551; *Blake v. Walsh*, 29 U. C. R. 541; *Marston v. Allen*, 8 M. & W. 494; *Adams v. Jones*, 12 A. & E. 455; *Lloyd v. Howard*, 15 Q. B. 995; *Bank of Montreal v. Reynolds*, 25 U. C. R. 352; *Atterbury v. Wallis*, 8 DeG. M. & G. 454; *v. Coddington*, 5 Johns. 54.

Miller, Q. C., for the respondent. The appellant is a legal practioner, and must be presumed to have known the law. Being aware that Currie was financially weak, and that it was rumoured that he was committing frauds, he was guilty of negligence in not limiting the endorsement by making it payable to "The Canadian Bank of Commerce or order." As was admitted on the argument in the Court of Queen's Bench, the respondent is a holder for value before maturity. No notice of any equity attaching to the endorsement was given, nor was there any proof of negligence on his part, and as the note was taken by him in accordance with the prevailing practice with banks and persons when accommodation endorsements are given, negligence should not be inferred. The appellant, by his conduct, clearly constituted Currie his agent to transfer the note, and is bound by his act and transfer. To hold that this instrument can be controlled by such an agreement as is set up here, would be most injurious to the banking business of the country. He cited *Baxendale v. Bennett*, L. R. 3 Q. B. D. 525.

January 26th, 1880. Moss, C. J. A.—After much fluctuation of opinion, and with some slight residuum of doubt, I concur in the judgment of the Court of Queen's Bench.

I confess that it is not easy to combat the reasoning which upon an application, apparently strict and logical, of well-settled principles, leads to an opposite conclusion. The general doctrine admits of no dispute, that it is essential to a complete and effectual endorsement, that the endorser should not merely write his name upon the paper, but deliver the instrument with the intention of transferring the property. His delivery for a particular purpose without such intention does not amount to a valid endorsement, as, for example, if he entrusted its possession to an agent for collection. Upon this it is argued with great cogency that as the defendant neither personally delivered, nor authorized Currie as his agent to make a delivery, to the plaintiff, this essential element of a valid endorsement is absent. If it were necessary, in order to bind the defendant, that the delivery should be from him to the plaintiff, or to some one else than Currie, this reasoning strikes the mind as almost impregnable. But the question arises, whether this is capable of being sustained as an absolute, unqualified proposition. Without any further act on the part of the defendant, the delivery to Currie was confessedly perfect and sufficient to the extent of enabling him to negotiate the paper with the bank, provided he applied the proceeds towards retiring the note for a larger amount, endorsed by the defendant and held by the bank.

Indeed, I apprehend that it is clear both upon principle and authority that if Currie had discounted this note in some other bank, and applied the proceeds in reduction of the other note, the defendant could not have been heard to complain. Even those cases in the United States which have gone the greatest length in shielding the endorser of an accommodation note, which the maker has wrongfully diverted from its intended use, have accepted this doctrine.

Without multiplying instances, it will be sufficient to refer to a few cases in which the subject was discussed.

In *Montross v. Clark*, 2 Sand. 115, it was said that the parties to every accommodation bill hold themselves out to the public by their signatures to be absolutely bound to

every person who shall take the same for value to the same extent as if that value were personally advanced to them, or on their account, or at their request. The note in question had been signed by the defendant for the accommodation of his brother, in order to help him out of his difficulties, and without any express restriction as to the mode of using it. This accommodation was given for the express purpose of enabling the payee to raise money from the bank, and although the name of the bank was mentioned, from which it was hoped that the advance might be obtained, this formed no element in the defendant's consent to lend his name.

As the instrument was used by the *payee*, the case in itself is materially different from that in hand, but the course of reasoning and general language used in the judgment shews the view entertained by a Court of great learning with respect to the large obligations which a person lending his name to another assumes.

In *Fetters v. The Muncie National Bank*, 34 Ind. 257, an accommodation bill was endorsed by the defendant for the purpose of enabling a person to raise money, in the application of which the defendant had no interest, but instead of being used for that purpose, it was applied to the payment of a pre-existing debt.

The question as stated by the Court was, whether it is a good defence for an accommodation endorser to shew that he endorsed the bill to enable the party for whom he endorsed to raise money, and that instead of using it for that purpose, he used it in payment of a pre-existing debt, the party receiving it and afterwards suing on it having notice of that fact, but the indorser having no interest in the application of the money. The Court thought that in reason the only answer to this proposition is, that as the party accommodated would, on receipt of the money, which it was intended to raise, have the power to do what he pleased therewith, and might use it at once to pay the pre-existing debt, it could make no material difference to the endorser whether the bill was transferred for money, or on account of the previous liability.

It is also laid down in explicit terms that the accommodation party must have some interest in the application of the money, otherwise he is not in a condition to contend successfully that there has been a mis-application of it, or of the security on which it was to be raised. Obviously the last stated proposition materially qualifies the applicability of the decision, because here the defendant had a decided interest in the mode in which the note was to be used. But it seems to indicate that the doctrine of agency in naked terms, is not sufficient to solve the question of the transfer of the property in the note by the maker. It may be that it proves no more than that in the opinion of that Court an accommodation endorser, who has no interest in the application of the proceeds, impliedly clothes the maker with plenary power to use the instrument as he may choose, while an endorser having an interest gives him a limited authority. It seems, however, difficult to assign the precise legal principle for such a distinction.

The rule was formulated in *Wardell v. Howell*, 9 Wend. 170, in the following terms, at p. 174: "Where a note has effected the substantial purpose for which it was designed by the parties, an accommodation endorser cannot object that it was not effected in the precise manner contemplated at the time of its creation. But where a note has been diverted from its original destination and fraudulently put in circulation by the maker or his agent, the holder cannot recover upon it against an accommodation endorser without shewing that he received it in good faith, in the ordinary course of trade, and paid for it a valuable consideration."

I may remark in passing, that if this should prove to be an exact statement of the true rule, it fits the plaintiff's case, unless it be suggested that he did not take this note in the ordinary course of trade. To this objection an answer is supplied by very high authority in the judgment delivered in *Swift v. Tyson*, 16 Pet. 15, from which I may be permitted to make an extract: "Assuming it to be true, (which, however, may well admit of some doubt from the generality of the language) that the holder of a negoti-

able instrument is unaffected with the equities between the antecedent parties, of which he has no notice, only where he receives it in the usual course of trade and business for a valuable consideration before it becomes due, we are prepared to say that receiving it in payment of, or as security for, a pre-existing debt, is according to the known usual course of trade and business." I forbear from more extended quotation, but I may refer to the whole judgment as a model of judicial exposition, which for elegance of style, felicity of illustration, and closeness of reasoning would not have been unworthy of the genius of a Lord Stowell.

With great respect for the contrary opinion, I now think it erroneous to treat this case as governed by the ordinary rules relating to the transfer of property in a note by the payee. It was never intended that the defendant should have any property in this note. The substance of the transaction was that he endorsed it for the accommodation of Currie, with the intention and under the expectation that it would be used in a particular way, and the latter, in fraud of that purpose, used it for another. The note, however, was not the less current. According to Currie's statement to the defendant, it had been offered to the bank for discount and refused. It had become current for that purpose at least, and it, therefore, appears to me that the real question is, whether its wrongful diversion from that purpose, or its misappropriation after that purpose had proved unattainable, destroys the apparent title of a *bona fide* holder for value.

There is no room for doubt upon the finding of the learned Judge who tried the case, read in the light of the highest authorities, that the plaintiff can claim recognition as such a holder. Following the line of cases, at the head of which now stands *Goodman v. Harvey*, 4 A. & E. 870, he held that as upon the evidence the plaintiff was not chargeable with *mala fides*, the circumstances under which he received the note could not defeat his title. During the argument I was under the impresssion that some distinction might possibly be traceable between the position of one taking a

note under such circumstances in satisfaction of an antecedent debt, and that of a person purchasing it for a present advance. I thought that while the latter might be permitted to say that the endorser could not object to his having reasonably acted on the belief that his name had been lent to raise money, the former could not urge that he was justified in assuming that it might be properly used to discharge an existing liability. But I have not been able to see my way to drawing any intelligible line between them.

It is perfectly well settled that one is as much a purchaser for value as the other, and in the eye of the law is entitled to an equal measure of protection. In the very late case of *Currie v. Misa*, L. R. 10 Ex. 153, Lord Coleridge, while dissenting from the majority of the Exchequer Chamber on the ground that different considerations applied to a cheque, expressly said that a pre-existing debt due to the transferee of a bill, entitles him to all the rights of a holder for value. A curious diversity of opinion long existed in the United States Courts, but it would seem that the English rule is now followed. The doctrine is thus tersely stated by Black, C. J.: "He who chooses to put himself in the front of a negotiable instrument for the benefit of his friend, must abide the consequences, and has no more right to complain, if his friend accommodates himself by pledging it for an old debt, than if he had used it in any other way."

In using the expression "in the front," it is perhaps scarcely necessary to say, the learned Judge did not intend to exclude the case of an endorser. The plaintiff's legal rights are, therefore, co-extensive with those of any bank which had advanced money upon the faith of this document; and I think it would be a serious thing to determine that such a holder could not recover. Indeed, while I have dwelt somewhat upon this view, it is only proper to observe that those who cannot accept it, appear to concede that a decision which would defeat the plaintiff would be fatal to the bank's title, except, perhaps, where the money had been applied towards satisfying the former note.

It has been pointed out that no evidence was produced of a general custom which would absolutely relieve bankers or discounters, advancing money to the maker of a promissory note endorsed for his accommodation, from any obligation to enquire from the endorser whether he had lent his name for that or for some other purpose. But I do not feel bound wholly to shut my eyes to the notorious fact, with which every member of the community who is concerned in, or has had occasion to observe the dealings of merchants, brokers, and bill-discounters with their customers is perfectly familiar, that such transactions are of every day occurrence, and are entered into under the belief that the law warrants the assumption that the endorser has lent his name to enable the maker to use the note in the money market.

It seems reasonably to follow that an endorser ought to be taken to have contemplated the chance, and to have been content to run the risk, of the note being so used, notwithstanding any private arrangement between the maker and himself. When such a notion becomes generally recognized and is acted upon in the daily transactions of life, it may well be deemed to have been incorporated into the *lex mercatoria*.

The very rule which enables a holder who has himself not the shred of title, to give another the right to recover upon a negotiable instrument, rests upon a similar foundation. I do not overlook the rule that a custom must at first be proved strictly, and be recognized by a competent Court, before judicial notice of its existence can generally be taken, but it seems to me that exceptions have been engrafted upon the common law with great ease where the questions related to mercantile usage. Judges, when dealing with such subjects, have not always felt bound to attribute to themselves ignorance of ordinary business rules with which every other member of the community, possessing any degree of intelligence, was fully acquainted.

In *Misa v. Currie*, L. R. 1 App. 554, Lord Hatherley said

that he would be prepared to hold according to the decision in *Brandas v. Barnett*, 1 M. & G. 908, 12 C. & F. 787, that the custom of bankers is now perfectly well established, and must be taken to be known to every mercantile person in the city of London.

In an elaborate and highly instructive judgment, delivered by Cockburn, C. J., in the Exchequer Chamber, *Goodwin v. Robarts*, L. R. 10 Ex. 352, this language occurs: "It thus appears that all these instruments which are said to have derived their negotiability from the law merchant, had their origin, and that at no very remote period, in mercantile usage, and were adopted into the law by our Courts, as being in conformity with the usages of trade."

Although the authorities bearing more or less closely upon the main question have been discussed with great fullness and care in the earlier stage of this case, the importance of the subject induces me to state the way in which the most important have impressed my mind. In the United States the question has been very frequently considered, although not, so far as I have observed, from precisely the points of view which have appeared to us to be the most prominent; and in their books support can be found for either conclusion. In some of the States it has been adjudged that if the endorser had a personal interest in the application of the note, as where its proceeds were to be applied in the discharge of a liability he was under, the person taking from the maker could not recover. In others the broader doctrine has prevailed, that the endorser, by writing his name, and delivering the paper to the maker, had held him out as a man whom he trusted to use the note as his necessities might dictate. In *Stoddard v. Kimball*, 6 Cushing 469, Shaw, C. J. said, at p. 470: "An endorser of an accommodation note passed by endorsement to a *bonâ fide* holder in due course of business, is effectually bound to all the liability to which by law the endorser of a business note is liable. He stipulates to take on himself the qualified obligation of one who endorses and puts in

circulation a note taken by himself for value in the course of business."

I have already had occasion to refer to the opinion expressed by the Supreme Court of the State of New York, in *Wardell v. Howell*, 9 Wend. 170. In *Mohawk Bank v. Corey*, 1 Hill 513, it was said that if the note had been made for the purpose of taking up another note in the Albany City Bank, to which the endorsers were parties, it would have presented a different question. With regard to the nature of the representation made by a person who chooses to endorse a note for the benefit of a friend, Mr. Justice Story in his *Treatise on Promissory Notes*, which is very frequently referred to in England as entitled to the highest consideration, uses very comprehensive language. He says, in sec. 194: "In short, the parties to every accommodation note hold themselves out to the public, by their signatures, to be absolutely bound to every person who shall take the same for value, to the same extent as if that value were personally advanced to them, or on their account, and at their request."

The most recent exposition of the law by a text-writer is to be found in the following extract taken from the 2nd edition of Mr. Daniel's valuable treatise on *Negotiable Instruments*. "Whether or not a bill in the hands of the acceptor before maturity, could be acquired from him under an indorsement in blank by the payee, so as to protect the endorser from defences available between anterior parties is a disputed question. In New York it has been held that it cannot, on the ground that the presumption in such a case is, that the acceptor either holds it for acceptance or after payment, in either of which cases he would have no authority to negotiate it. In England it has been held that the party acquiring the bill for value under such circumstances is entitled to protection as a *bona fide* holder without notice, on the ground that he has a right to presume that the bill has been drawn for accommodation of the acceptor, and Lord Abinger, C. B., in giving judgment to this effect has forcibly expressed this view, which seems to us correct."

The case to which he refers is *Morley v. Culverwell*, 7 M. & W. 174. That was an action by the indorser against the drawer of a bill, drawn by the defendant on and accepted by one Riley, payable to the order of the defendant. One ground of defence was, that before the maturity of the bill, and while the defendant was the holder, an agreement was made between him and Riley, that upon the latter giving him security by way of mortgage he should deliver up the bill as discharged and fully satisfied, and that this agreement was carried into effect, and the bill delivered up as satisfied, and not for the purpose of being negotiated. It was also alleged that Riley had endorsed to one Short, and Short to the plaintiff without consideration, but this was proved to be untrue. I do not think that the decision in the case can be taken as an authority precisely in point, because the plaintiff had received the note from the endorser Short, who was the person apparently entitled to its possession. The discussion, therefore, principally turned upon the question of whether the instrument had lost all vitality, or whether it could be again put in circulation by the acceptor notwithstanding the arrangement between himself and the drawer. But the language used by the learned barons has an important bearing upon the exact point we are now considering. Lord Abinger said: "The drawer of the bill agrees with the acceptor while it is running to deliver it up to him in consideration of his having the security of a mortgage of property of the acceptor, and gives up the bill accordingly, without striking out his name as drawer. * * If, upon its being discharged before it becomes due, the drawer inadvertently leaves his name upon the bill, he is but in the ordinary case of a party who has a bill in negotiation with his name upon it, against his intention. It is in the hands of an innocent holder who has no notice that it has been discharged. Suppose mutual accommodation acceptances to be given, and to be exchanged before they have been negotiated, the names remaining on them; the parties may circulate them so as to give a title to a *bona*

fide holder, before they become due." Parke, B., said, that in order to establish the plea it was necessary to prove the two allegations which put the plaintiff in the same situation with Riley, namely, that Riley endorsed to Short, and Short to the plaintiff, without value or consideration, and that as valuable consideration had been shewn for both endorsements, the question was, whether the fact of the acceptor having satisfied the bill before it became due is any defence against a *bona fide* endorsee.

The Court were unanimously of opinion that it was not. Now, the importance of these opinions is, that they shew that negotiability does not necessarily depend upon the transfer being made by the person whom the form of the instrument would point out as the holder, but that a transfer by the acceptor of a bill, and therefore by the maker of a note, may entitle the transferee to recover against the endorser, although such delivery was wholly unauthorized by the true agreement between the parties, and the maker himself had no shadow of a claim against the endorser upon the instrument. They shew, or tend to shew, that in such a case as that we are now considering the *lex mercatoria* supersedes the ordinary law of principal and agent. Riley had no more authority from the defendant to deliver the bill and put it into circulation, than Currie had from Brown. Indeed, he had even less authority, because it was delivered to him as an extinct instrument, while the note here was placed in the hands of Currie to be used, albeit only for a special purpose. Yet the Court of Exchequer thought that the mere possession of the dead instrument bearing the uncanceled signature of the drawer, enabled the acceptor to give it life. It will be observed that the Court held that payment, to be effectual to prevent the re-issue of a negotiable instrument, must be made at maturity. This was no novel doctrine.

In *Burbridge v. Manners*, 3 Camp. 193, a bill which had been paid came into the hands of the plaintiff before it was due. Lord Ellenborough held that the plaintiff was entitled to a verdict. While he held that a bill paid at ma-

turity cannot be re-issued, he was of opinion that a payment by anticipation does not extinguish it any more than if it were merely discounted. The reason he gives is applicable to this case. It is that a contrary doctrine would add a new clog to the circulation of bills of exchange and promissory notes, for it would be impossible to know whether there had not been an anticipated payment. He added that is the duty of bankers to make some memorandum on bills and notes which have been paid, and if they do not, the holders of such securities cannot be affected by any payments made before they are due. The observation is significant. It may well be asked whether it was not equally Mr. Brown's duty to denote upon this instrument itself, that his endorsement was given for a special purpose only.

The facts raised by the pleadings in *Bartrum v. Caddy*, 9 A. & E. 275, which came before the Court on demurrer, presented general features closely resembling those with which we are dealing. The action was against the accommodation endorser of a note payable on demand, who set up that he had lent his name to the maker for the sole purpose of depositing it as a security with one Bartlett for a debt due by the maker, and that the maker afterwards paid the debt, and having got back the note, delivered it more than two years after its date to the plaintiffs to secure a debt he owed them. The note being payable on demand, it is obvious that the payment actually made was equivalent to a payment at maturity. The precise point adjudged was that upon general demurrer this statement was in effect no averment of payment, and that the Statute 55 Geo. III. ch. 184, prohibited a re-issue; but the value of the case for our present purpose depends upon the circumstance that it is clearly assumed that but for the payment the maker might have made the endorser liable to the plaintiff.

As I read the decision of the Exchequer Chamber in *Harmer v. Steele*, 4 Ex. 1, it fully recognises the power of an acceptor to give fresh negotiability to a bill paid before maturity. Without commenting upon them I may refer to *Lazarus v. Cowie*, 3 Q. B. 459, and *Attenborough v.*

Mackenzie, 25 L. J. Ex. 244. In my judgment, these cases are all strong authorities for the proposition that the *bonâ fide* recipient for value from the maker of an endorsed note before maturity is justified in acting upon the assumption that he is clothed with authority to put it into circulation.

This position seems to me to be fortified by the familiar decisions upon the liability of the endorser for accommodation of a blank acceptance. No matter what may have been the private agreement between himself and the person he is accommodating, he is held to have authorized the insertion of any sum which the stamp will cover. This doctrine is explained in many cases, as, for example, *Schultz v. Astley*, 2 Bing. N. C. 544; *Watson v. Russell*, 3 B. & S. 34; and *Baxendale v. Bennett*, L. R. 3 Q. B. D. 525; but I have nowhere seen it enunciated with greater precision and fulness, and with a clearer recognition of the principles on which it is founded, than by Mr. Justice Clifford, in delivering the judgment of the Supreme Court of the United States, in *Michigan Bank v. Eldred*, 9 Wall. 544, at p. 551, "It is well settled law," said that learned Judge, "that where a party to a negotiable bill of exchange or promissory note containing blanks, intrusts it to the custody of another, whether the blanks are in the date or in the amount of the note, and whether it be for the purpose of accommodating the person to whom it was entrusted, or to be used to raise money for his own benefit, such bill, or note, especially if it be endorsed in blank, or is made payable to bearer, carries on its face an implied authority in the person to whom it is so entrusted to fill up the blanks in his discretion; and as between such party to the bill or note and innocent third parties holding the bill or note as transferees for value, in the usual course of business, the person to whom it is so intrusted must be deemed to be the agent of the party who committed such bill or note to his custody." It appears to be no stronger thing to hold that where he delivers the instrument to the maker, without denoting in any way the precise purpose for which it is given, he shall be held to have authorized its delivery to any *bonâ fide* holder for value.

The great principle, to which the Courts have firmly adhered, is that restrictions upon the free and untrammelled circulation of negotiable papers are to be discouraged, and that the person who has enabled another to put such an instrument into circulation, with his name upon it, ought to be the one to suffer for his negligence or mistaken confidence.

I have quoted more copiously than is my habit from the decisions of United States Courts, but the opinions are those of distinguished jurists, who were not only dealing with the rights of a community whose commercial relations and modes of transacting business closely resemble our own, but were as intimately acquainted with the leading principles of English law as if it they had been bred in Westminster Hall.

In arriving at the conclusion that this appeal should be dismissed, I have earnestly endeavoured not to allow my mind to be unduly influenced by the conviction that an opposite result would startle the whole mercantile community. I fully recognize the duty we owe to the defendant of declaring the law, as we understand it, without regard to the consequences to others, but I cordially agree with the observation which, if I mistake not, has more than once been made by the learned Chief Justice of the Queen's Bench, that any decision that has that tendency should only be pronounced upon the clearest reasoning, or under the irresistible pressure of authority. I do not think that upon either of these grounds am I compelled to reverse this judgment.

In my opinion, the appeal should be dismissed, with costs.

PATTERSON, J. A.—It is only after much hesitation that I have been able to concur in affirming the judgment in the plaintiff's favour. I am not yet satisfied that a contrary finding would not be more consonant with sound principle.

The plaintiff asserts title as indorsee of Brown. In my opinion Brown never indorsed the note to the plaintiff, or to any other person. Two things are necessary to a complete

indorsement, viz., the writing of the name and the manual delivery of the note, or some equivalent act, on the part of the indorser: *Marston v. Allen*, 8 M. & W. 494. *Adams v. Jones*, 12 A. & E. 455; *Lloyd v. Howard*, 15 Q.B. 995; *Austin v. Farmer*, 30 U. C. R. 10, and cases there cited; *Denton v. Peters*, L. R. 5 Q. B. 475. Here Brown had done the one act. He had written his name on the note, but he certainly never made a manual or other delivery of it to the plaintiff, and therefore never indorsed it to the plaintiff, by any act done by his own hand. If he did it at all, it was by the hand of Currie, as his agent. But Currie had no authority to employ the note, except for the purpose of retiring the other; and, therefore, if the plaintiff has to prove an indorsement by Brown or his duly authorized agent, he must fail in this action. Currie's agency was limited to the completion of the indorsement by delivery of the note to the bank where the other note was held.

It is contended, however, that Brown had created an appearance of authority in Currie by entrusting him with his name, and so is bound by whatever Currie may have done, so long as the person taking the note from him for value had no notice of his want of authority; and that the plaintiff occupies that position. The argument before us has been, to a great extent, addressed to this view of the case; and reference has been made, in support of the plaintiff's side, to the cases in which persons giving blank acceptances have been held liable for the amount inserted in the bill, although much larger than was authorized. There would be no difficulty in applying the principle of these cases if the plaintiff had taken the note from the party who, in the ordinary course of business, would have been the holder of it. The obstacle here is in the fact that the plaintiff took the note from the hands of the maker; and, under the facts as established, had to derive his title, not from the man he dealt with, but from the payee and indorser of the note. The authority of Currie to act for the indorser was therefore a matter of first importance, unless the plaintiff was excused, by reason of either the form of the transaction or the absence of notice, from making inquiries.

Some of the cases cited to us may be referred to upon this point. In *Russell v. Langstaffe*, the report of which case (in 2 Doug. 514) contains the often-quoted observation of Lord Mansfield, that the indorsement on a blank note is a letter of credit for an indefinite sum, it was contended, on behalf of the indorser, that the notes being blank when he indorsed them, his signature was a nullity. His liability was affirmed, on the ground that he had authorized the maker to complete the notes, by filling up the blanks. There was no question of fraud, or excess of authority, committed by the maker. He had dealt with the notes just as it was intended by the endorser he should deal with them.

In *Aude v. Dixon*, 6 Ex. 869, the defendant had signed a promissory note, as surety for his brother, on the representation that another person was to join as co-surety; the instrument being filled up, except the date and the name of the payee. The brother took it to the plaintiff, who advanced money upon it upon the representation of the brother that he had authority to deal with it, the brother filling the blanks by inserting the date and the plaintiff's name as payee. It was held, that no such authority having been given, except on the co-surety joining, the plaintiff could not recover. Parke, B., said, at p. 872: "A party who takes such an incomplete instrument cannot recover upon it, unless the person from whom he receives it had a real authority to deal with it. There was no such authority in this case, and unless the circumstances shew that the defendant conducted himself in such a way as to lead the plaintiff to believe that the defendant's brother had authority, he can take no better title than the defendant's brother could give. The maxim of law is '*Nemo plus juris in alium transferre potest quam ipse habet.*' It is a fallacy to say that the plaintiff is a *bonâ fide* holder for value; he has taken a piece of blank paper, not a promissory note. He could only take it as a note under the authority of the defendant's brother, and he had no authority; consequently the instrument is void as against the defendant."

Hatch v. Searles, 2 Sm. & Giff. 147, was an administration suit. Two persons, named Stanway and Conway, had sought to prove, as creditors on the estate, upon bills of exchange accepted by the testator. The chief clerk had disallowed both claims, and the parties appealed to Vice-Chancellor Stuart. The testator had written his name across two blank pieces of paper, impressed as bills of exchange with a stamp for 3s. 6d. each, and had given them to a Mr. Curtis. This was done in order to assist Mr. Curtis, who was in want of money, and at his request. Curtis filled up one as a bill for £100, in presence of a Mr. Wallis and Mr. Stanway, and Wallis discounted it for Curtis, and afterwards negotiated it with Stanway.

The other blank was filled by Curtis as a bill for £50, which was discounted by Conway.

The bills were, in fact, completed after the testator's death; but the decision did not turn upon that circumstance.

It will be useful to extract some of the observations made by the Vice-Chancellor in giving judgment; both because they contain a lucid statement of the law, and because I shall thus avoid having to make an independent reference to some cases which he notices. He said: "Some propositions stated in the reported decisions of Judges of the very highest authority have been relied upon, and used in a sense inconsistent with the established principles of the law of contract. In the case of *Russell v. Langstaffe*, 2 Doug. 514, Lord Mansfield laid it down as clear law, that the indorsement in blank of a note is a letter of credit for an indefinite sum. Subsequent authorities have held the amount to be defined by the limits of the stamp. In the latest case quoted before me at the bar, *Montague v. Perkins*, 22 L. J. C. P. 187, the Lord Chief Justice Jervis stated the law in these terms, at p. 189: 'That the giving a blank acceptance is evidence of an authority to the party to whom it is given to fill up the bill for the amount, and it may be for the time to which the stamp extends.' The proposition is stated in similar terms in many other cases. But it is always so stated

with reference to the rights of a *bona fide* holder for valuable consideration without notice. The general terms in which the proposition is stated must be read with reference to the facts of the cases to which it was applied. As an absolute general proposition it cannot be maintained. And, though in the passage quoted in the last case from the judgment of Lord Chief Justice Jervis, it is stated in general terms, and sounding as an absolute rule, yet the subsequent passages in the same judgment introduce proper qualifications, and say that giving a blank acceptance is only *prima facie* evidence of authority to fill up, and being only *prima facie* evidence may, of course, be rebutted by evidence of the real nature and extent of the authority, and of the true terms of the contract, and of the whole transaction between the person who signs in blank and the person to whom the blank acceptance is given. Therefore the general proposition relied on in support of these motions does not absolutely govern, when the question is between the acceptor in blank and the person who receives it in blank from him, if the transaction between them is not supported by any valuable consideration. Independently of any other evidence of a contract between these two persons, the blank acceptance is an imperfect instrument, which, in itself, could create no contract, although *prima facie*, but only *prima facie*, it might imply some authority to one of the parties. As to a *bona fide* holder, the question as to the effect of the acceptance or endorsement having been written on a blank piece of paper can be of no importance, unless he is fastened with notice of that imperfection. If the holder has notice of the imperfection, he can be in no better situation than the person who took it in blank, as to any right against the acceptor or indorser who gave it in blank. But, if he be a *bona fide* holder without notice, as he must have taken the negotiable instrument in a perfect shape, and in terms a complete contract, without any notice, or any circumstances of suspicion to call for inquiry, which would be equivalent to notice, the law in favour of the rights of a *bona fide* holder of the negotiable instrument,

apparently perfect as a contract, will not permit the acceptor to annul the effect of his own act, upon evidence of a transaction to which the holder was not privy, and which may contradict the terms of the written contract, to which the *bona fide* holder was justified in giving credit."

The Vice-Chancellor then held that both claimants had notice of the imperfection of the bills in the hands of Curtis, and that neither of them occupied any better position than Curtis himself.

From this judgment Conway appealed, and the judgment was affirmed by the L.JJ., Knight Bruce and Turner, 24 L. J. Chy. 22, before whom the subject chiefly discussed was the sufficiency of the evidence of notice to Conway. The law acted upon by the Vice-Chancellor was not questioned.

The plaintiff, in taking this note from Currie, prudently asked no questions; a safe course in a transaction which is regular on its face, but which will afford no assistance if the circumstance that the note was in the hands of the maker called for inquiry as to his authority to do an act which would bind the indorser.

We have been told that it is a very common thing in this country for banks and other money lenders to take bills and notes from the acceptor or maker, already indorsed for their accommodation; and that to hold the indorser of such a bill free from liability, because the acceptor has negotiated it in fraud of him and without his authority, would be to unsettle an established mode of doing business. I cannot say I am much pressed by this argument. It is not to be assumed that, if business is done as alleged, it is usual for the accommodated party, be he acceptor or maker, to use the security in any way contrary to his true authority. But if, under the law merchant, he is not the party who should be the holder of the paper he presents for negotiation and from whom the title to it should come, I see nothing unreasonable in holding that the banker deals with him at the risk of his really possessing the authority he professes to exercise. The validity of the transaction would, in

my judgment, be properly tested by the same principles which apply to dealings with other chattel property. A purchaser of merchandize from an agent who exceeds his authority in selling to him cannot, at common law, maintain his title to what he buys by the mere fact that his vendor had possession, or even had possession as agent to sell, if his power did not extend to the particular transaction. The Factors' Act, C. S. C. ch. 59, affords protection in the case of goods or documents of title to them, by declaring that the agent entrusted with the possession shall, for certain purposes, be deemed the owner, notwithstanding that he is known to be the agent only; but no such legislative protection is thrown around the person who relies on an agent's authority to negotiate a promissory note.

These considerations have great weight with me against the plaintiff's right to recover; and I should feel compelled to yield to them if it were clear that a person taking a promissory note from the maker, or a bill from the acceptor, was not justified by the law merchant in regarding him as the indorsee or legal holder of the instrument, capable of transferring it as his own act, as by indorsing it over, and not merely as agent for another indorser whose name was upon it. If the maker were also indorsee, and the note had, by reason of being indorsed in blank by the the payee, become payable to bearer, he could of course transfer it by delivery only.

It appears from several decisions to which our attention was not particularly called upon the argument, that the maker or acceptor may himself become the holder of the bill or note while it is still current, as by himself discounting it, and will in that case have the same right to negotiate it as any other holder would have. Wilde, C. J., in giving the judgment of the Court of Exchequer Chamber in *Harmer v. Steele*, 4 Ex. at p. 11, said: "We think that it is no objection to the negotiability of a bill, that it has during its currency, before it was payable, become the property of one of the acceptors. Until the time for payment arrives, the contract of the acceptors is unperformed, and

incapable of being performed, and the right to sue upon it may be transferred with the property on the bill by any lawful owner of it; and it is no objection to such transfer or to an action brought by one claiming under it, that the party making it would have been incapacitated to sue if he had retained the bill till maturity." In *Attenborough v. Mackenzie*, 25 L. J. Exch. 244, the acceptor had discounted the bill for the drawer and afterwards reissued it. The drawer was held liable.

In *Morley v. Culverwell*, 7 M. & W. 174, the bill had been returned by the drawer to the acceptor as satisfied. But the drawer omitted to remove his name from the bill, and the acceptor, before the bill was due, endorsed it for value to a person who endorsed it to the plaintiff. The plaintiff's right to recover in that case was sustained on the same ground as in the later cases of *Harman v. Steele*, and *Attenborough v. Mackenzie*, viz., that the bill was not paid. payment meaning payment according to the law merchant, at the maturity of the bill, and not at an earlier date.

The case of *Bartrum v. Caddy*, 9 A. & E. 275, had some facts not unlike those in the case before us. Hatherly & Hamlyn owed Bartlett £200, for which he required security. The defendant endorsed in blank a promissory note made by Hatherly & Hamlyn, payable on demand to the defendant or order, for their accommodation, and delivered it to them for the purpose of depositing it with Bartlett as such security, and for no other purpose whatever. The note was accordingly delivered to Bartlett as security for the debt, and afterwards, when they paid the debt, was re-delivered to Hatherly & Hamlyn, one of whom, two years after the date of the note, delivered it to the plaintiffs to secure a debt due from himself alone to the plaintiffs, and without defendant's authority. The case was decided in favour of the defendant, on the ground that the note had been paid by the payment of the debt to secure which it was given, and that the Stamp Act of 55 Geo. III., ch. 184, prohibited the re-issuing of it.

Burbridge v. Manners, 3 Camp. 193, was an earlier case

than any of those I have mentioned. It was an action on a promissory note which had been delivered by the maker, with the endorsement of the defendant upon it, to a creditor, who had paid it in to his bankers, who were to present it for payment. It was paid, before maturity, to the bankers by some person who carried it away without its being cancelled or any memorandum being made upon it. It is not stated from whom it came into the plaintiff's hands, but he had received it before it was due, and recovered upon it.

I do not see my way, in the face of these cases, to hold that the circumstance of the note being in the hands of the maker, was of itself notice to the plaintiff that he did not hold it in the due course of its negotiation as a mercantile security. If he had notice of the terms on which Currie really had it, he would have been bound by whatever was the true extent of Currie's authority to deal with it. As it was suggested in *Attenborough v. McKenzie*, the plaintiff would have been bound if he had had notice of an understanding that the bill was not to be re-issued. But no such notice is brought home to the plaintiff; and although we may think the plaintiff had a very good idea of the true state of the affair, that is not enough.

The question in *Jewell v. Parr*, 13 C. B. 909, was whether there was evidence for the jury that a bill had been paid at maturity and afterwards re-issued. Cresswell, J., in that case, stated the rule that juries are not to indulge in conjecture, but to deal with facts that are properly proved before them; and it was then held that facts which would not have left the conjecture quite without foundation, did not afford evidence which could properly be laid before a jury.

Upon the whole, I have to agree that we should leave the judgment for the plaintiff undisturbed.

MORRISON, J. A.—I am of opinion that the conclusion arrived at by the Court of Queen's Bench is entirely correct, and that the plaintiff is entitled to our judgment. The

case is simply this. The defendant, at the request and for the accommodation of Currie, indorsed the note in question, which was made by Currie payable to the defendant, for \$500, payable in three months, and dated the 15th May, 1877, and the defendant handed it to Currie to discount it, and, with the necessary additional amount, to retire a note for \$550, made by Currie and endorsed by the defendant, then overdue and held by the Bank of Commerce at St. Catharines. A few days after the defendant delivered the note so endorsed to Currie, the latter being pressed by the plaintiff for payment of certain moneys which Currie had received for the plaintiff upon a mortgage placed in his hands for collection, Currie, in part payment and settlement of such claim produced, and proposed to the plaintiff to take the note now sued on, and the plaintiff, on the faith of the defendant's name being on the note, accepted it and released Currie from his liability and discharged the mortgage—the plaintiff having no notice or knowledge of the arrangement between Currie and the defendant as to the disposition of the note. The plaintiff afterwards placed the note in the Bank of Commerce for collection. The plaintiff was however aware of the friendly relations existing between Currie and the defendant Brown, and that the latter was in the habit of assisting Currie with his name. Under these facts, I would not have thought it necessary to say more than that I concurred in the judgment of the Court below; but as it was strongly argued at the bar that the judgment ought to be reversed, the importance of the subject requires me to state briefly the grounds upon which I think the plaintiff is entitled to have this appeal dismissed.

I will first observe, that to allow this appeal would be disturbing, without any good reason that I can see, a course of dealing, I may say an established practice, of bankers, merchants, and others, to take without enquiry from the makers of promissory notes dealing with them, notes made by them, payable to a friend who writes his name on the back as a surety or accommodation endorser, and entrusts

the maker with his endorsement, to be used or negotiated by such maker. And it would be a matter of surprise to banks and persons in business if we should reverse the judgment of the Court of Queen's Bench, to find, in taking from the maker a note endorsed as the one now in question, that the liability of such endorser may be defeated by some secret agreement between the endorser and maker when the former entrusted his name to the latter.

I need hardly say that the policy of the law is to give every facility to the use and to the transmission of notes from hand to hand, and that it is essential to their negotiability that the *bona fide* holder who receives a note before maturity should not be bound to inquire into the consideration, or the circumstances under which an indorser placed his name on a note, or entrusted the maker or other person with its possession to use or negotiate it. In the case before us, when Currie, a few days after the date of the note, produced and offered it to the plaintiff in payment and discharge of his liability, the plaintiff in my opinion was not put on enquiry as to the circumstances under which Currie held this note. The offer of the note to the plaintiff justified him in assuming that the defendant endorsed the note and handed it to Currie to use it for his own purposes, and to deliver it to any person with whom Currie might negotiate it. I fully concur in the remarks of the learned Chief Justice who delivered the judgment in the Court below. To decide that a *bona fide* holder, who receives a note from the maker like the one in question, cannot recover against the endorser if the maker negotiates contrary to a private understanding between himself and his accommodation endorser, would render void transactions that have been considered binding, transactions that take place I may safely say hundreds in a year, the validity and binding character of which has hitherto (as far as I am aware) never been disputed, and would disturb a course and mode of dealing which has been found simple and convenient for the purpose of trade and business. Where credit is given, and security is required, a

large proportion of the trade and discount business of the country is carried on through the instrumentality of such accommodation notes. There are a great number of authorities, English and American, bearing upon the questions involved in this appeal. I shall only refer to a few of those decided in England.

In *Swan* against the *North British Australian Co.*, 32 L. J. Ex. 273, at pp. 277 and 279, where it was contended that the defendant was estopped from contesting a fraudulent transfer of shares, Byles, J., in giving judgment, said: "I cannot think that any analogy can be safely drawn between such a case and the case of negotiable instruments, where such estoppels are very common, and where, great as is the injustice which they inflict, the argument of inconvenience is so strong, that it is necessary that they should exist. The strongest case is, where a man loses or parts with his name written on a piece of stamped paper. There he is responsible to any *bona fide* holder, where it is filled up as a promissory note, or as a bill of exchange, to an amount warranted by the stamp." And in the same case, Cockburn, C. J., said at p. 279: "The rule relating to negotiable instruments stands on peculiar grounds. The law relating to these instruments is part of the law merchant, which in order that the negotiability of such instruments (which is of the very essence of their commercial utility) shall not be impaired, establishes that if a man once puts his name to such an instrument he shall be liable to a *bona fide* holder, without notice, in respect of what may be added to give effect or negotiability to the instrument, notwithstanding this may be done in the absence of authority, or even for the purposes of fraud." And in *Palmer v. Barber*, 2 L. M. & P. 1, 6 Ex. 63, Pollock, C. B., said at p. 3: "Although we are anxious to repress dealings in bills of exchange by parties who often make use of them for fraudulent purposes, the Courts ought never to forget the extreme importance to the commercial world of their free circulation. Were we to hold that there had been no indorsement to Tingey in the present case, no person would

be safe in taking a bill of exchange, without ascertaining what was the intention in parting with it of every indorser whose name was upon the back of it." And Parke, B., said at p. 4: "When a man endorses a bill with his name, and gives it so indorsed to some one who delivers it to a third person, that is evidence of an indorsement from the first person to the third, in the absence of fraud on his part." In that case the bill was given by E., the indorser, to B., to get it discounted for the defendant (the acceptor). B., instead of discounting it as instructed, pledged it with Tingey, a pawnbroker, and obtained an advance of money upon it; and it was contended there was no evidence of an indorsement by E. to Tingey.

I cannot accede to the argument urged at the bar that the case turns upon a mere question of agency. Mercantile agency has always been influenced and governed by mercantile usage and the necessities and the convenience of commerce, and from an early period negotiable instruments, such as bills and promissory notes, have not been considered subject to the general principles of agency. I cannot distinguish this case in principle from the case of a person handing to another a blank note with his name endorsed thereon, for the purpose of its being negotiated, upon the understanding that the note should not be used or filled up for a sum exceeding a named amount, and such person, contrary to the understanding, filling it up for a much greater amount. I take it to be clear that the endorser so intrusting his name would be liable to any holder who *bona fide* took the note for value.

In *Russell v. Langstaffe*, 2 Doug. 514, Lord Mansfield, in giving judgment, said at p. 516: "There is nothing so clear as the first point. The endorsement on a blank note is a letter of credit for an indefinite sum. The defendant said, 'Trust Galley to any amount, and I will be his security.' It does not lie in his mouth to say the endorsements were not regular."

In that case the maker filled up the blanks and discounted the notes. Here, the defendant, by his blank

endorsement and delivering it to Currie, said to the world, trust Currie to the amount of \$500, and I will be this surety, and will guarantee the payment of his note at maturity.

In *Peacock v. Rhodes*, in the same vol. p. 636, Lord Mansfield, in giving judgment, says: "The holder of a bill of exchange or promissory note is not to be considered in the light of an assignee of the payee. An assignee must take the thing assigned subject to all the equity to which the original party was subject. If this rule applied to bills and promissory notes, it would stop their currency. The law is settled, that a holder coming fairly by a bill or note, has nothing to do with the transaction between the original parties, unless, perhaps, in the single case (which is a hard one, but has been determined) of a note for money won at play. I see no difference between a note endorsed blank and one payable to bearer. They both go by delivery, and possession proves property in both cases."

In *Watson v. Russell*, 31 L. J. Q. B. 304, Cockburn, C. J., says at p. 307: "I concur in thinking that the plaintiff is not entitled to recover back the amount of his cheque on the ground of its having been transferred to the defendant by the party to whom it was given in disregard of the terms on which alone the latter was justified in using it. I consider the law to be now quite settled, that if a person puts his name to a paper which either is, or by being filled up or endorsed may be converted into a negotiable security, and allows such paper to get into the hands of another person, who transfers the same to a holder for consideration, and without notice, such party is liable to such *bona fide* holder, however fraudulent or even felonious as against him the transfer of the security may have been. And in this respect there can be no difference between a bill of exchange and a cheque, which substantially is the same thing as a bill of exchange, although by the custom of bankers the preliminary of acceptance is dispensed with."

Assuming that the case rested upon a question of agency,

it nevertheless seems to me that the defendant ought to be held liable; for the defendant, after writing his blank indorsement on the note, handed it to Currie for the purpose of its being used by him. He therefore clothed Currie with an apparent general unrestricted authority to deliver the note to any person with whom Currie might use it; and so the plaintiff took the note upon the credit of the defendant's endorsement, and discharged Currie from his liability. It is true that the defendant did not authorize Currie to make use of the note as he did; but he put Currie in his place to do that kind of act. In *Baxendale v. Bennett*, L. R. 3 Q. B. D. 525, Brett, L. J., in pronouncing judgment, says: "When a man has signed a blank acceptance, and has issued it, and has authorized the holder to fill it up, he is liable on the bill, whatever the amount may be, although he has given secret instructions to the holder as to the amount for which he should fill it up. He has enabled his agent to deceive an innocent party, and he is liable; because bills of exchange are negotiable instruments, current in like manner as if they were gold or bank notes; but whether the acceptor is liable on it depends upon his having issued the acceptance intending it to be used." There can be no doubt here that the defendant gave the note to Currie with his blank endorsement on it, intending it to be used. If the defendant had not the fullest confidence in Currie's integrity, he could have restricted the use of his indorsement, such as indorsing it payable to the manager of the bank for whom it was intended; but by entrusting his blank endorsement to Currie, he said to the world (and it is the fair inference) that Currie had authority to use his name to negotiate and deliver the note to any person with whom Currie might deal; and the defendant ought not to be allowed, under such circumstances, to relieve himself from liability, by saying that there was a private arrangement between himself and Currie that the note should only be used for one particular purpose.

It is, I think, therefore, only just and reasonable that the defendant ought to be held liable, if upon no other

ground, upon the broad general principle that whenever one of two innocent persons must suffer by the act of a third, it is reasonable that he who by misplaced confidence has enabled the third person to occasion the loss, should sustain it. The dishonest misappropriation of this note may work a hardship to this appellant; but it would be a greater hardship to the plaintiff were we to hold that his right to recover is defeated by the secret arrangement between the appellant and Currie.

It was also contended that there was negligence on the part of the plaintiff in taking the note from Currie without enquiry. I cannot say that the negligence imputed to the plaintiff ought to affect his right to recover, considering the every day practice I have already alluded to of accommodation indorsers intrusting the use of their names to the makers of notes. There was nothing unusual in the circumstance of Currie having the defendant's blank indorsement in his possession and offering the note to the plaintiff in payment of his debt. The object of an accommodation indorsement is to enable the maker to use his note upon the security of the indorser's name, Such object cannot be effected by the maker without his being able to produce the note indorsed. The negligence here was on the part of the defendant, who might have restricted the use of his name, as before mentioned, by a special indorsement, or by even writing the word "renewal" across the face of the note, which is frequently done to prevent a renewal note being used for any other purpose than retiring a previous note made and indorsed by the same parties; in short the defendant omitted every precaution to protect himself, and so enabled Currie to do what he now complains of. On the question of negligence I may refer to the case of *Goodman v. Harvey*, 4 A. & E. 870, where Lord Denman says: "I believe we are all of opinion that gross negligence only would not be a sufficient answer where the party has given consideration for the bill. Gross negligence may be evidence of *mala fides*, but is not the same thing. We have shaken off the last remnant

of, the contrary doctrine. Where the bill has passed to the plaintiff without any proof of bad faith in him there is no objection to his title." Also to the case of the *Bank of Bengal v. Fagan*, 13 Jur. 950, and 7 Moo. P. C. 61, at p. 72, decided in the House of Lords, where Lord Brougham, in giving judgment, said: "It may be taken as admitted that whatever may have been the law established for a time in *Gill v. Cubitt*, 3 B. & C. 466, and *Down v. Hawling*, 4 B. & C. 330, and one or two other cases, and not abandoned, at least as far as the language went which the Court used in some subsequent cases, such is now law no longer; and that the negligence of the party taking a negotiable instrument does not fix him with the defective title of the party passing it to him."

On the whole, I am of opinion this appeal should be dismissed with costs.

BLAKE, V. C.—Except for two authorities, I should not have thought the plaintiff could recover in this case. A piece of paper which contains a promise that the defendant Currie will pay the defendant Brown \$500, is found in the hands of Currie. It is in the form of a promissory note, but was not, I should have thought, in circulation, so as to bring it within the rule as to negotiable instruments, and was in the hands of Currie as custodian, who was to deal with it in a manner specifically defined by the person whose name is on the back of it as endorser. It was inoperative in the hands of Currie as against Brown, and seemingly needed a delivery so as to make it available as a promissory note. As it stands before delivery, it may be made for accommodation, endorsed for accommodation, or prepared to answer a special purpose, or to be held until some condition is fulfilled. In the hands of Currie it is not a current note. Something has to be done to set it on its journey as a negotiable instrument with the peculiarities which attach to this class of securities. Circumspection is called for in dealing with such an instrument in its inception, which is not called for when it has been completed

by endorsement and delivery. The person taking this promissory note, it might fairly be argued, not taking it from the payee, but from the hands of the person to pay, cannot be said to take it in the usual course of business, and is not brought within the protection afforded to those dealing with negotiable instruments.

In *Whistler v. Forster*, 14 C. B. N. S. 248, Mr. Justice Willes thus expresses the well known principle: at p. 257, "The general rule of law is undoubted, that no one can transfer a better title than he himself possesses: '*Nemo dat quod non habet.*' To this there are some exceptions; one of which arises out of the rule of the law-merchant as to negotiable instruments." I should have thought that when the plaintiff took the instrument in question it had not the attributes of a negotiable instrument, and the recipient took it at his risk, and has not had transferred to him a better title than Currie had. We are not on the present occasion troubled with the consideration of any practice or custom amongst bankers, brokers, or others, as to their dealing with negotiable instruments, as no evidence on the point was given, nor was it sought to sustain the plaintiff's position on this ground. In *Morley v. Culverwell*, 7 M. & W. 174, the Court expressed the opinion that a note, although not actually in circulation, could, under circumstances such as the present, be transferred, so that the transferee could hold it and claim under it the rights awarded ordinarily to the holder of this class of mercantile securities.

Lord Abinger says: "Suppose mutual accommodation acceptances to be given, and to be exchanged before they have been negotiated, the names remaining on them; the parties may circulate them so as to give a title to a *bona fide* holder, before they became due." And in *Attenborough v. Mackenzie*, 25 L. J. Ex. 245, Pollock, C. B., says: "When a bill has been created according to the custom of merchants as a real commercial transaction, it is part of the general circulating medium of the country."

I am of opinion, therefore, that we are bound to hold,

as this note was made for a real commercial transaction, to be used as the means of discharging another promissory note by discount or otherwise, the transferee was entitled to take it as a negotiable instrument, and that he became a *bona fide* holder, entitled to the protection given to such holders of promissory notes. I think the appeal should be dismissed, with costs.

Appeal dismissed.

DILKE V. DOUGLAS ET AL.

Mortgages—Discharge by surviving mortgagee.

The registration of a certificate given by the survivor of several mortgagees, upon payment in money of the mortgage debt, effectually discharges the mortgage, and reverts the legal estate.

C. executed two mortgages in favour of M. B. and her two sisters, for moneys advanced by them, which were duly registered. He afterwards sold portions of the land to D. and E., giving them his covenant against incumbrances. Subsequently, and after the death of the two sisters, C. procured M. B. to execute discharges of these mortgages, giving her instead a mortgage on other lands of ample value, by way of security, and after the registration of these discharges he sold the rest of the land comprised in the original mortgages to others. These purchasers took in good faith for value, having no actual notice of the two original mortgages. C. afterwards induced M. B. to accept in lieu of this mortgage which she discharged, a mortgage upon other lands which proved almost worthless. Upon the death of M. B., the personal representatives of herself and her sisters filed a bill seeking to charge the land embraced in the original mortgages with the amount remaining due thereon.

Held, reversing the decree of Blake, V. C., 26 Gr. 99, that the discharges by M. B. were valid and effectual, so far as the purchasers, after they had been registered, were concerned, as when they received their conveyances and paid the consideration therefor, a discharge by M. B., the person entitled by law to receive the money was registered, and they were not bound to enquire whether payment in money had been actually made; but that the discharges were inoperative in favour of C. and of D. and E. who purchased from him with notice of the mortgage by reason of the registry, to extinguish the interest of the deceased sisters other than M. B., as she could only discharge the mortgages upon payment of the debt, and not by the acceptance of another security.

THIS was an appeal from a decree of Blake, V. C., reported 26 Gr. 99. The facts are stated there, and in the judgment on this appeal.

The case was argued on the 15th September, 1879 (a). *The Attorney-General* and *W. H. McClive*, for the appellants. The debt being a joint obligation to the three mortgagees, on the death of her sisters, it survived to Mrs. Bullock, and she alone could release or in any manner extinguish the right of action thereon. It is clear that mortgagees are intended to take as joint tenants. This is the conclusion at which the Courts in the United States have arrived: *Appleton v. Boyd*, 7 Mass. 131; *Kinsley v. Abbott*, 19 Me. 430. A payment to Mrs. Bullock would undoubtedly have been proper, and as accord and satisfaction was equally good, the mortgages were satisfied and discharged by her acceptance of the substituted security, which was of ample value, and was given and taken *bonâ fide*. Under 31 Vic. ch. 20, sec. 60, now R. S. O., ch. 111, sec. 67, being the person entitled by law to receive the money, Mrs. Bullock was competent to execute a discharge, which, on being registered, had the effect of a reconveyance: 35 Geo. III., ch; 5; 4 Wm. IV., ch. 16; 14 & 15 Vic., ch. 7; 32 Vic., ch. 16, sec. 2 O.; *Lee v. Morrow*, 25 U. C. R. 604; *Locke v. Loomas*, 5 DeG. & S. 328; *Schofield v. Templar*, Johns. Chy. Cases, 155; *Jones v. Powles*, 3 M. & K. 581. The appellants, other than Douglas and Duffy, are purchasers for value without notice, and the discharges being good at law cannot be set aside in equity, except on the ground of fraud, of which there was an entire absence. The injury to the plaintiffs arose from the subsequent discharge by Mrs. Bullock of the substituted mortgage without receiving the money, and taking instead the last mortgage, which was worthless; but the appellants cannot be held responsible for this. As these appellants have thus obtained a good title, Douglas and Duffy cannot be bound, for the discharges.

(a) *Present*.—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

enabled Currie to sell to innocent parties, and thus deprive them of the other parts of the mortgaged estates to which they would otherwise have been entitled to resort for indemnity: *Jones v. Beck*, 18 Gr. 671. Their position having thus been altered to their prejudice, it would be most unjust to enforce the respondents' equity against them. Moreover, by registering the discharges, Currie satisfied his covenants to Duffy and Douglas, and their right of release was thereby extinguished, and it would now be a fraud on them to set up the mortgages. If the discharges had been impeached when fresh, the appellants would have obtained redress and satisfaction from Currie, but they have now no recourse against him. They cited *Petty v. Styward*, 1 Chy. Rep. 57; *Rigden v. Vallier*, 2 Ves. Sr. 258, *Crew v. Diksen*, 4 Ves. 97; *Matson v. Dennis*, 10 Jur. N. S.; *Lee v. Morrow*, 25 U. C. R. 604; *Wallace v. Kelsall*; 7 M. & W. 263; *Husband v. Davis*, 10 C. B. 645; R. S. O. ch. 99, sec. 7; R. S. O. ch. 105, sec. 11; *Vickers v. Cowell*, 1 Beav. 529; *Dart on V. & P.*, p. 431, 3rd ed.; *Sheppard's Touchstone*, p. 142; *Goodwin v. Richardson*, 11 Mass. 469; *Jones on Mortgages*, sec. 958.

Bethune, Q.C., and *Gregory Cox*, for the respondents. We submit that there was no survivorship in Mrs. Bullock, as joint mortgagees are clearly tenants in common of the mortgage moneys and lands comprised in the mortgage: Wh. & Tud. L. C. 788; *Fisher on Mortgages*, vol. 2, p. 796, 3rd ed.; *Forsyth v. Drake*, 1 Gr. 273; *Smith v. Boucher*, 9 Gr. 347. Mrs. Bullock, therefore, as the survivor of the three mortgagees, had no right to accept a new security in lieu of the original mortgages. Currie was clearly guilty of fraud in procuring discharges of the original mortgages, and the substitution therefor of insufficient security, which Mrs. Bullock accepted without the knowledge or sanction of her sister's representatives; and though the first substituted mortgage was ample, the second was from the time of its execution grossly inadequate. As the appellants purchased after the mortgages in question were duly registered, and had thereby actual notice of the mortgages, they are precluded from

setting up the defence of *bona fide* purchasers without notice. 31 Vic. ch. 20, sec. 60, R. S. O. ch. 111, sec. 67, which has been relied on by the appellants, enacts that "where any mortgage has been satisfied," a discharge executed by the mortgagee, "or such other person as may be entitled by law to receive the money and discharge the mortgage," and registered as directed, shall be an effectual release of the mortgage. Here the mortgages were not satisfied, because Mrs. Bullock had no right, even if entitled to receive payment of the mortgage money, to exercise her judgment to the prejudice of the representatives of her co-mortgagees, by accepting a new security; and Mrs. Bullock not being sole owner of the legal estate in the lands was incompetent to execute a valid and sufficient reconveyance thereof, as she did not unite in herself the two requisites mentioned in the statute. The view of Story, C. J., in *Randall v. Phillips*, 3 Mason 378, is the correct one, and should be applied to sec. 11 of R. S. O., ch. 105. The American cases relied on by the appellant rest on *Appleton v. Boyd*, 7 Mass. 131, which is bad law and should not be followed. Inasmuch as the defendants Duffy and Douglas bought before the execution of the discharges, they at any rate cannot rely on them as a protection against the respondents' claim. The transactions in question must be looked at as a connected series. Mrs. Bullock was a woman of great age, had no independent advice, and allowed Currie to deal with the mortgages to suit his own convenience, and the second security substituted by Currie being insufficient, such insufficiency must have the same effect and entitle the respondents to the same relief as if the first substituted mortgage had not intervened. The discharges of the original mortgages being invalid as against the representatives of her sisters, they cannot be prejudiced by the acceptance by Mrs. Bullock, without their knowledge or consent, of the substituted securities. There was no consideration whatever for the changes of security; they were made solely for the benefit and convenience of Currie. The respondents have done nothing to disentitle themselves to relief. The injury to the

appellants is the result solely of their own negligence in not properly investigating the registered titles, and of the wrongful conduct of Currie. No laches are chargeable against the respondents, for they took proceedings within a short time after the interest ceased to be paid, and the true character of the transactions in question came to light.

January 26th, 1880. Moss, C. J. A., delivered the judgment of the Court.

This case raises questions of some nicety, to which we have given very careful consideration. The parties adopted the judicious and highly convenient course of agreeing to a statement of facts, which were to be taken as established for the purposes of the appeal. The following summary embraces those which appear to us to be material.

The suit is brought by the representatives of three deceased mortgagees, who were sisters. It seeks the foreclosure of two mortgages made by Mr. Currie, one of them on freehold property in Grimsby, dated 17th March, 1862, to secure payment of \$1,800 on the 10th January, 1865, with interest in the meantime; and the other on freehold property in St. Catharines, dated 8th December, 1863, to secure payment of \$1,900 in December, 1866, with interest in the meantime. Mr. Currie had borrowed from the mortgagees at various times the sum of \$3,700, in which they were interested in certain proportions, as the mortgagor knew, although he did not know the precise proportions. Both these instruments had been duly registered before the transactions which we are about to describe.

In August, 1867, Mr. Currie conveyed a part of the St. Catharines property for valuable consideration to Mrs. Duffy, one of the appellants, by the ordinary statutory conveyance, which contained a covenant for title against incumbrances. This conveyance was recorded immediately after being made, and a mortgage given for the unpaid portion of the purchase money, which was satisfied and discharged in December, 1871.

In May, 1868, he sold the Grimsby lands to Robert Douglas for valuable consideration, and gave him a similar conveyance. In this transaction a mortgage was also given for the unpaid portion of the purchase money, which was satisfied and discharged in May, 1873.

In June, 1873, and, although it is not expressly stated, we may reasonably infer as preliminary to the sale next to be mentioned, Currie induced Mrs. Bullock, who was then the sole survivor of the three mortgagees, to accept another mortgage for \$3,500 upon lands of ample value, to secure the balance remaining due upon the two mortgages; and as such survivor she executed statutory discharges of these mortgages, acknowledging payment and satisfaction in the usual form. These were respectively registered on the 2nd and 4th of August, 1873, the obvious effect of which was apparently to relieve both the Grimsby and St. Catharines lands from encumbrances. We have remarked that this was preliminary to a contemplated sale, but it might also be assumed that the arrangement was effected by Mr. Currie in order to fulfil his engagements to the previous purchasers. Whether it was warranted by law or not, it worked no positive wrong to any person, for the mortgaged land being of ample value, the interests of Mrs. Bullock and the representatives of her sisters were fully protected.

In August, 1873, Currie sold and conveyed to John Ross another parcel of the St. Catharines land, by a statutory conveyance containing covenants for title and against encumbrances, which was registered on the 6th of that month, and he took a mortgage for the unpaid part of the purchase money. This mortgage was subsequently assigned for value, and without notice of any encumbrance upon the property, to the appellant Eleanor Alexander. Afterwards Currie, to suit his own convenience, procured Mrs. Bullock to accept in lieu of the mortgage for \$3,500, which she discharged, a mortgage upon other lands, which has proved to be an almost worthless security. The other appellants derived title under Ross and Eleanor Alexander by various transactions and conveyances, into the details of which it

does not appear to us to be necessary to enter. None of the appellants had before the commencement of the suit any actual notice of the existence of the two mortgages now sought to be enforced, or of any encumbrance on the lands they claim, and they all took their estates in good faith and gave value.

Mr. Currie continued to pay interest until shortly before the bill was filed. In all the transactions Mrs. Bullock acted without any independent advice or assistance, and relied solely upon the integrity of Mr. Currie, who was a practising solicitor.

One of the sisters died in 1859, and probate of her will was granted in November of that year. Another died in 1868, but there was no representation of her estate until about three months prior to the filing the bill, when letters of administration were obtained. It does not appear when Mrs. Bullock died, but we think that it was stated at the bar to have been shortly before the commencement of the suit. It will be observed that the appellants are divided into two classes, viz., Duffy and Douglas, who acquired title while the original mortgages were all registered encumbrances of unimpaired validity, and the others who purchased after Mrs. Bullock had assumed to discharge these mortgages.

The learned Vice-Chancellor was of opinion, upon the authority of *Petty v. Styward*, 1 Chy. Rep. 31, *Hurd v. Poole*, 1 K. & J 383, and *Matson v. Dennis*, 10 Jur. N. S. 64, that Mrs. Bullock did not possess the right to receive the mortgage money and to discharge the mortgages; but that even if she had this power on payment, it could only be exercised upon payment being actually made. In conformity with that view, he held the two mortgages to be still subsisting charges. The argument before us, which was conducted with great learning and ability, took a somewhat extensive range, and when we do not now notice some of the topics discussed, it is not because we have overlooked them, but because their treatment does not seem to us to be material to the view we have formed.

It is scarcely necessary to observe that the statutory discharge of a mortgage is a very peculiar instrument. Having no effect upon the legal estate before registration, by that Act it may be made to operate upon it, and in the case of a deceased mortgagee although it is executed by his personal representative in whom the legal estate never vested. It was early introduced into the law of the Province, as part of the machinery for transferring real estate. The 35 Geo. III. ch. 5, gives in a schedule a form of certificate of mortgage money being paid, but there is nothing said in the statute of the effect that its registration should have upon the legal estate. The Act of 4 Wm. IV., ch. 16, after reciting that a certificate of payment, or performance of the condition did not in law operate as a reconveyance of the original estate of the mortgagor, or as a release or defeasance of such mortgage, enacted in the most comprehensive terms that any certificate by any mortgagee, his heirs, executors, administrators, or assigns, theretofore given and registered under the provisions of the Act of Geo. III., or thereafter registered, whether given before or after the time limited for payment or performance, should be valid and effectual in law as a release and reconveyance of the original estate of the mortgagor. The 9 Vic. ch. 34, sec. 24, empowered a registrar on receiving a certificate in the form prescribed to record it, and enacted that it should be deemed a discharge, and provided that a certificate of the mortgagee, his heirs, executors, administrators, or assigns, whether given before or after the time limited for payment, should be valid and effectual as a release and a reconveyance of the original estate.

The 12 Vic. ch. 71, sec. 9, enacted, that when any person entitled to any freehold land by way of mortgage, has or shall have departed this life, and his executor or administrator is entitled to the money secured by the mortgage, and the legal estate is vested in the heir or devisee, or in the heir, devisee, or other assignee of such heir or devisee, and possession had not been taken by virtue of the mortgage, nor any action or suit pending, such execu-

tor or administrator shall have power upon payment of the principal money and interest due to him on the said mortgage, to convey, by deed or surrender, the legal estate; and such conveyance shall be as effectual a if made by the heir or devisee.

The tenth section of the same Act declared that the *bonâ fide* payment of any money to, and the receipt thereof by, any person to whom the same is payable, upon any express or implied trust, or for any limited purpose, and such payment to, and receipt by, the survivors or survivor of two or more mortgagees, or the executors or administrators of such survivor, or their or his assigns, shall effectually discharge the person paying the same from seeing to the application, or being answerable for the misapplication thereof, unless the contrary be expressly declared by the instrument creating the trust or security.

The ninth section was repealed by 14 & 15 Vic., ch. 7, sec. 8, and there was substituted for it the provision, that when the executor or administrator of a deceased mortgagee is entitled to the mortgage money, or has assented to a bequest thereof, or has assigned the debt, he may, if the mortgage money was paid to the deceased in his lifetime, or on payment of the principal and interest due, convey, release, and discharge the mortgage debt and the legal estate in the land; and that the executor or administrator should have the same power as to any portion of the lands on payment of some part of the mortgage debt, or on any arrangement for exonerating the whole or any part of the mortgaged lands without payment of money; and that such conveyance, release, or discharge, should be as effectual as if the same had been made by the person having the legal estate.

By the 32 Vic., ch. 10, sec. 2, this power was extended to the case of an assignment of the mortgage by a personal representative.

The 60th section of 31 Vic., ch. 20, O., which was in force at the date of the impeached discharges, enacted, that when any registered mortgage shall have been satisfied, the

registrar, on receiving a certificate executed by the mortgagee, or by such other person as may be entitled by law to receive the money and to discharge such mortgage, according to the prescribed form, shall register the same, and the same shall be deemed a discharge of such mortgage; and the registered certificate shall be as valid and effectual in law as a release of such mortgage, and as a conveyance to the mortgagor.

The 62nd section of the same Act declared that every certificate of payment or discharge of the mortgage, or of the conditions therein, or of the lands or any part of the same, or of any part of the money, by the mortgagee or his assignee, his heirs, executors, administrators or assigns, *or any one of them*, at whatsoever time given, and whether before or after the time limited by the mortgage for payment or performance, shall be valid, if in conformity with the Act, to all intents and purposes therein mentioned.

We have referred to these various statutes because it appears to us that there runs through them a steady policy of enabling the person, or even one of the persons, entitled to receive the mortgage debt, to discharge the mortgage and restore the legal estate.

The argument for the plaintiffs has been mainly based upon the proposition that the three sisters were tenants in common of the mortgage money, and of the legal estate, and that there was no survivorship. With regard to the effect of sec. 60 of the Statute of 31 Vic., it was argued that it is a condition precedent to the execution of a valid certificate by any person that he should unite in himself the two characters of title by law to receive the money, and title by law to discharge the mortgage, and that as Mrs. Bullock was only a tenant in common of the legal estate, she could not execute an effectual reconveyance. In support of these propositions, reliance was placed on the 10th sec. of C. S. U. C. ch. 82, which provides that where land has been granted or conveyed to two or more persons other than executors or trustees in fee simple, or for any less estate, it shall be considered that such persons took as tenants in

common, and not as joint tenants, unless an intention sufficiently appears on the face of the instrument that they are to take as joint tenants.

Very similar provisions have received judicial consideration in United States cases, which were commented upon at the bar. In *Appleton v. Boyd*, 7 Mass. 131, it was decided that where land was conveyed to two persons in mortgage as security for a joint debt, it was held in joint tenancy notwithstanding an enactment which does not appear to be distinguishable from ours. The *ratio decidendi* was, that as upon the death of either mortgagee the remedy to recover the debt would survive, it was the intent of the parties that the mortgage should comport with that remedy, or otherwise a moiety of the freehold would remain as collateral security for the joint debt, which would be repugnant to the intention.

The plaintiffs here laid much stress upon the case of *Randall v. Phillips*, 3 Mason 378, decided by Mr. Justice Story, in Rhode Island. By a statute of that State all deeds to two or more persons created tenancies in common, unless the words used clearly and manifestly shew an intention to create a joint tenancy. That eminent jurist determined that the circumstance of a mortgage being made to four persons, afforded no proof that the parties intended a joint tenancy in the mortgage. He criticized the judgment in *Appleton v. Boyd*, which he thought to be irreconcilable with established principles, and pointed out that if a conveyance were made to two mortgagees in fee, expressly as tenants in common, as security for a joint debt, they would so hold it by the common law; and upon the death of either his share would descend to his heirs as tenants in common, and the survivor would hold the other moiety as tenant in common, at the same time that the debt would vest solely in him by survivorship for the purpose of the remedy. But he held that at any rate in equity, as the mortgage was intended to secure the advances made by each of the grantees, though the title to the estate might, in the case of a joint tenancy,

survive at law, it would in equity be held as a trust for the benefit of the representatives of the deceased mortgagees to the extent of the interest in the debt secured by the mortgage.

The question was also considered in *Kinsley v. Abbott*, 19 Me. 434, and it was held that the case of a mortgage does not come within the mischief which the statute was designed to remedy. That mischief was the acquisition of the whole estate by the survivor. The whole *interest* in the debt does not become vested in the survivor. It is only the whole remedy that is vested in the survivor, who must account to the representatives of the deceased, and it would lead to great inconvenience if it should be laid down that the mortgaged estate was held in tenancy in common after the death of one of the mortgagees.

There certainly seem to be strong reasons of convenience in favour of the view presented by the Maine Court, although plausible objections may be made to its correctness. The rule appears to be settled in England in accordance with the statement in *Fisher on Mortgages*, sec. 1399, 3rd ed., that "the receipt of one joint creditor of a mortgage debt, without evidence of any special authority for him to receive it, will not discharge the security in equity, which treats the interest of the creditors as a tenancy in common." He refers to *Matson v. Dennis*, 4 DeG. J. & S. 345, 10 Jur. N. S. 460, which is also relied upon by the learned Vice-Chancellor in his judgment in this case. The point was raised by the purchaser of property, who declined to complete the purchase, on the ground of the non-concurrence in a previous sale of one of two persons interested in the purchase-money. Knight Bruce, L.J., said, p. 350: "The question is, whether, when an equitable charge is vested in two persons—and, as I will assume, as joint tenants—the money can be paid to one without any special authority from the other, so as to discharge the estate. I am not speaking of an action. I am speaking of discharging an equitable burden upon an estate, and so discharging the

estate. In my judgment, and in the absence of special circumstances, such as are not shewn to exist in the present case, that cannot be done." And of the same opinion was the Lord Justice Turner. But in that case the death of the non-concurring trustee was not proved, and it is therefore somewhat beside the point which we have to reach. It had previously been held, in *Vickers v. Carroll*, 1 Beav. 529, that the personal representatives of one deceased mortgagee were necessary parties with the survivor to a bill for foreclosure or redemption, on the ground that where money was advanced by several persons jointly on a security, though the right to it survived at law, yet that the same rule did not prevail in equity; but it was not intimated that the heir of the deceased was a necessary party, and indeed he clearly could not have been so considered. In *Hind v. Poole*, 1 K. & J. 383, the question was, whether the survivor of two mortgagees could make a good title upon a sale. Power was given to the two mortgagees, their heirs and assigns, to sell and to give receipts, it being declared that the mortgage money was advanced by them out of moneys in their possession on a joint account. It was held that the power of sale was exercisable by the survivor under these circumstances, and *a fortiori* where it was declared that the receipts of the survivor should be good discharges for the mortgage debt and interest. The Vice-Chancellor thought that as the power was given as security for money advanced upon joint account, which occasions survivorship as between mortgagees, there was a sufficient inference that it was the intention that the liberty to sell should be given to the same persons as were entitled to the money, namely, the two mortgagees and the survivor. But the broad ground upon which he put the case was that the mortgagor intended to give power to deal with the estate without danger of his interfering by a bill for redemption, and that he had given the mortgagees power to make the legal fee simple available to the same extent and in the same manner as they were interested in the money and the land, both of which would go to the survivor.

This reasoning cannot, we think, be deemed applicable to the present case, because here the money was not advanced out of a joint fund, nor were the mortgagees interested in equal proportions. These authorities seem to support Mr. Fisher's proposition, as to the equitable interest in the representatives of the deceased, and the other cases to which we were referred do not seem to have any distinct bearing upon the question. That being the general doctrine, we have now to consider the effect of our statutory provisions.

We have already quoted the terms of sec. 9 of ch. 90 C. S. U. C. (12 Vic. ch. 71, sec. 10), upon which the appellants mainly rely. It will be remembered that it makes the *bonâ fide* payment to, and receipt by, the survivor of several mortgagees, or the executors or administrators of such survivor, an effectual discharge to the person paying the same, from the duty of seeing to the application, or being answerable for the misapplication, thereof. This clause was borrowed from a corresponding one in the Imperial Act, 7 & 8 Vic., ch. 76, which, however, was repealed by 8 & 9 Vic., ch. 106, and it was after this repeal that the mortgage under adjudication in *Matson v. Dennis*, 10 Jur. N. S. 461, was made. This repeal was no doubt due to the considerations pointed out by Mr. Bellenden Ker, in his well-known letter to the Lord Chancellor. (See Leith, R. P. S. p. 84, and app. xxi.) In his opinion, the real inconvenience to be remedied arose in the case of the death of one of several trustees who had lent money upon a mortgage. We may quote the passage from the letter which contains his comments upon the provision with which we are now concerned: "It was to remove this inconvenience that the clause in question was framed; but it goes far beyond the evil in question, by making the receipts of the survivor of *all* mortgagees who are at law joint tenants sufficient. Now, in practice, many persons not trustees, &c., take securities in joint tenancy; and it would seem very inexpedient thus to repeal generally the salutary equitable rule as regards these securities, and to allow the survivor to possess himself of the whole funds

without the concurrence of the representatives of the other equitable tenant in common." The prompt repeal of the section proves that this view of its inexpediency prevailed with Parliament. But our Legislature must have thought that different considerations were applicable to the circumstances of this country, for the clause was enacted here four years after its repeal in England. We apprehend that there is no doubt that the construction which Mr. Bellenden Ker indicates is the correct one. The surviving mortgagee could already have given a receipt valid in a Court of law; the statute freed the person paying from any equitable obligation to see to the application of the money. Thus the survivor became, as far as the person paying was concerned, the person entitled, both at law and in equity, to receive the money and to give an effectual discharge from the debt. To that we must then couple the 60th section of 32 Vic., ch. 10, which makes a registered certificate, executed by the person entitled by law to receive the money and discharge the mortgage, as valid and effectual in law as a release of such mortgage and a conveyance to the mortgagor. It is impossible to draw any other conclusion than that the registration of a certificate given by the survivor, upon payment of the debt, effectually discharges the mortgage and reverts the legal estate. The whole tenor of the statutory regulations excludes the supposition that the survivor was authorized to receive the money and discharge the debt without being empowered to reconvey the legal estate.

But the statute, in terms, only refers to the *bonâ fide* payment of money. It does not expressly extend its protection to a mortgagor who, instead of actually paying the debt, chooses to enter into some different arrangement for securing it. It is urged that the substituted mortgage being ample security, it is equivalent to payment, but we do not feel at liberty to place such an extended construction upon the statute. Its natural and obvious import is that the relaxation of the doctrine of equity shall be confined to cases of actual payment of

money, and there is nothing either in the words or the spirit of the legislation which would warrant us in giving the same effect to the acceptance of another security as to a receipt of money. So far, therefore, as Currie was concerned, he could in no way claim that the interests of the deceased sisters in the estate were extinguished. Messrs. Duffy and Douglas stand in no better position. They purchased before Mrs. Bullock gave the discharge, and with full notice under the registry laws that the original mortgages were charges upon the properties. They were content to rely upon Currie's covenant to procure their removal, and if he had obtained a valid discharge it would have enured to their benefit. But the principles enunciated and acted upon in the recent case of *Heath v. Crealock*, L. R. 18 Eq. 215, 10 Ch. 22, are conclusive to show that their rights are measured by those of Currie. This case was not noticed at the bar, but it seems to us to be very much in point. There Heath and Crealock advanced money as trustees to Stephens, who subsequently agreed to sell portions of the mortgaged freehold to different persons for the sum of £3,080. Crealock, who was a solicitor, acted for Stephens in the matter, and represented to him that as Heath was abroad there would be great delay in procuring the execution of a conveyance by him. Accordingly it was determined to conceal the existence of the mortgage, which the possession of the deeds being with Crealock enabled them to do. The purchasers in good faith completed the purchase, after having taken all usual precautions and made all usual enquiries. They received deeds from Stephens, under which they supposed they took absolute estates in fee. Crealock received and appropriated the purchase moneys. Stephens supposing that these had been applied in reduction of the mortgage subsequently paid interest on the balance only. Some years afterwards Stephens agreed to sell another portion of the property to one Price for £1,500, and Crealock then represented to his co-trustee that Stephens had succeeded in selling a part of the mort-

gaged property for £3,080, and another part for £1,500, and was desirous of obtaining a reconveyance of these parcels upon payment of these sums in reduction of the mortgage debt.

The plaintiff executed deeds to carry out this arrangement, one being a reconveyance to Stephens of the parts first sold, and the other a conveyance to Price by direction of Stephens. Crealock received the £1,500, and soon afterwards absconded. The plaintiff then filed his bill to have it declared that the two sums of £3,080 and £1,500, were still charges upon the mortgaged estate. The contention of the earlier purchasers was, that although Stephens had not the legal estate when he conveyed to them, he afterwards obtained it by virtue of the reconveyance, and that the estoppel created by the conveyance to them was fed by the estate which Stephens acquired, and that thus the legal estate became complete. In this way they hoped to shield themselves as purchasers for value. But the Lord Chancellor, Lord Cairns, after holding that there was no estoppel operating so as to convey the legal estate to the purchasers, proceeded to observe, p. 30: "What then is it which the purchasers are purchasers of? They are purchasers of the equity of redemption which Stephens had to convey to them, and which he did convey to them by the purchase deeds. Had they anything more? It is said that they had in addition a contract with Stephens under the covenants for further assurance that if he obtained any further interest in the property he would convey it to them, and of the benefit of that contract they say they ought not to be deprived, and that they will be deprived of it if the reconveyance to Stephens is cancelled." He then proceeds to shew that the purchasers could, under the covenant, only insist on Stephens conveying to them what he acquired by fair and honest means.

Lord Justice James thus dealt with the subject, at p. 33: "With regard to the purchasers, it appears to me that there are two cardinal principles and rules of this Court which are involved both on the one side and on the other. The first I

take to be this, which in my opinion is a rule without exception, that from a purchaser for value without notice this Court takes away nothing which he has honestly acquired. * * Then there is another equally cardinal rule of this Court, that if a purchaser, however honest on the completion of his purchase, acquires a defective title, that defective title this Court will not allow to be strengthened either by his own fraud or that of any other person."

Lord Justice Mellish agreed that there was no estoppel; that it followed that the legal estate, when conveyed, remained in Stephens; and that, although no doubt if he had obtained it honestly he would have been a trustee for the purchasers, they had no case to prevent the deed which he obtained dishonestly from being set aside.

In the present case there is no ground for attributing fraud or dishonesty to Currie in procuring the discharge of the original mortgages. The sufficiency of the new security relieves him from that imputation. But the case seems to be equally strong against the prior purchasers. They cannot claim the benefit of the doctrine of estoppel any more than could the victims of Crealock's fraud. Currie is only a trustee of the legal estate which he acquired by the registration of the certificate from Mrs. Bullock. They are only holders of equitable estates, and over these the prior equity of the representatives of the deceased mortgagees must prevail. The equitable obligation, which was only extinguished when there was a *bond fide* payment of money to the survivor, still remains and is paramount. They knew that their estates were charged with these mortgages. They took their conveyances and paid their purchase money at their peril, and relying upon Currie's obtaining valid discharges.

As against the representatives of the deceased mortgagees Currie could not effectually set up the discharge, and these purchasers have no superior equity. They neither did anything, nor refrained from doing anything, on the faith of the existence of these discharges. An attempt was made to affect the plaintiffs with the conse-

quences of laches, on the suggestion that if proceedings had been sooner taken on their behalf these purchasers might have had a better chance of recovering their loss from Currie. This is altogether too shadowy and speculative to form a ground of equitable relief. The interest being regularly paid, there was nothing to excite suspicion or attract attention. The estate of one of the sisters was unrepresented, and there are other grounds, upon which we need not dwell, that it makes it futile to charge them with any negligence or default which could defeat the equity.

The position of the subsequent purchasers seems to us to be wholly different. When they received their conveyances and paid their money, Currie appeared upon the registry to have a perfect and unassailable title. He had recorded a certificate, in which the person entitled by law to receive the money had acknowledged its receipt, and declared that the mortgage had therefore been discharged. The registry law operated to make the certificate equivalent to a reconveyance from the person having the legal estate. It is true that its effect was liable to be avoided in equity, but before any movement in that direction was made Currie had conveyed to these innocent purchasers for value, and been paid the consideration. They appear to us to be in the same position as Mr. Price, in *Heath v. Crealock*, and the Court held that he was entitled to say, at p. 29: "Whatever were the circumstances under which this receipt for the £1,500 which I paid was signed by the plaintiff, I paid my money and took my conveyance upon the faith of the receipt, and no equity existing between Stephens and Crealock on the one hand, and the plaintiff on the other, can be used to defeat the title and the legal estate which I have obtained."

In our opinion this doctrine should be rigidly maintained in a country where the system of real property law has taught the people at large to place great reliance upon the state of the registered title. To pronounce that the purchasers in this case were bound to enquire whether payment in money had actually been made, would be

practically to neutralize the statutory provision sanctioning payment to a survivor. In every case it would be necessary to obtain some document from the representatives of the deceased, because in any other way it would be extremely difficult to preserve satisfactory evidence that there had been a *bonâ fide* payment.

We observe that Mrs. Duffy has not joined in the appeal. As to her, therefore, the decree simply stands. The appeal must, as regards Douglas, be dismissed, with costs; and as regards the others, allowed, with costs, and the bill dismissed, with costs.

RE ROSS ESTATE.

Master's office—Production.

In an administration suit, where certain creditors produced promissory notes as vouchers for nearly all their claim, the Master, as of course, ordered production of the books and accounts. On appeal, Proudfoot, V. C., held (8 P. R. 86,) that in the first instance (no special cause for investigating the account being made out,) the Master should have accepted as sufficient the offer of the creditors to allow an inspection of the books and accounts at their office.

Held, reversing this decision, that the executors were also entitled to an affidavit identifying the books and accounts as being all in their possession relating to the claim.

THIS was an appeal from a decision of Proudfoot, V. C., reversing an order of the Master at Barrie, by which he directed production in his office of the books of creditors, who produced promissory notes as vouchers for nearly all their claims, reported 8 P. R. 86.

The case was argued on the 1st of December, 1879 (*a*).

W. Mulock, for the appellants. The appellants are entitled to discovery in the Master's office in respect of the

(*a*) *Present*.—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

claim in question. Whether they are entitled to the unqualified discovery ordered by the Master is another question; but certainly they are entitled to discovery in whatever mode may be deemed reasonable. This being an administration suit, every creditor's claim, until assented to or adjudicated upon by the Master, constitutes a separate issue in which these appellants occupy the same position that they would had an action been brought against them at law. Now at law the defendants would have been entitled to examine the respondents, and to require them on such examination to produce such books and papers as by the direction of the Master they were ordered to produce in his office. Having, however, brought their legal demand into this Court, the respondents must subject themselves to the same obligations that they would have been subject to had they brought an action at law. The claim in question being a purely legal claim, the appellant's right to discovery cannot be curtailed merely because the claim is under adjudication in this Court instead of in a Court of law, where but for this suit it is properly recognizable: R. S. O., c. 50, secs. 169, 179; *Whitaker v. Wright*, 2 Ha. 315. Even if the demand were only cognizable in a Court of Equity, the appellants are entitled to discovery. G. O. 482 authorizes the Master, when adjudicating on claims before him, to order such production as he thinks fit. The claim in question was under adjudication; it had not been allowed or disallowed. It is true that the appellants had not filed any paper contesting the claim, for this they could not do, and are in fact expressly prevented from doing by G. O. 229, which abolished the old practice of filing statements of facts, charges, and discharges in the Master's office, and such the appellants required, and the Master ordered production. It is clear, that the appellants had not assented to and the Master had not disposed of the claim, but that it was treated as disputed, and that the parties were at issue in regard to it. No doubt it is discretionary with the Master as to how he will order production; but as in this case the appellants are merely

executors, and have no personal knowledge of the claim, and considering the amount of the claim, it was a most proper case in which the Master should exercise the discretion conferred upon him by G. O. 482. It may be that had the respondents applied to the Master, he would have modified his direction so as to occasion to them the least possible inconvenience, and to this course the appellants would have raised no objection, but they submit that until the respondents had applied to the Master to vary his *ex parte* direction, an appeal did not lie from such direction, and that for this reason also the learned Vice-Chancellor's order is wrong: *Sturgeon v. Hooker*, 2 Phil. 289. The appellants contend that they are entitled to production under oath, and they are willing to have the Master's direction modified in any way to suit the convenience of the respondents, provided they are secured in obtaining discovery substantially to the effect contended for.

W. Macdonald, for the respondents. The Master in exercising the power given him in G. O. 220, 222, *et seq.*, must exercise a judicial and not an arbitrary discretion, and is governed by the same rules that regulate the Court in the exercise of this jurisdiction: *Taylor's Chy. Orders*, note to G. O. 220. Here there is no material upon which to exercise a judicial discretion. The Master makes the order simply upon the verbal request of the appellants' solicitor. Discovery is only in aid of a case alleged by the party seeking it: *Kerr on Discovery*, pp. 14, 15, 16. Its purpose is not inquisitorial, but merely to enable the Court to settle a question in dispute: *Kerr*, p. 160. Here there is nothing for the Court to settle. The appellants do not even claim that the account is open. Hence there is no case whatever, to which the evidence of the books is applicable. The account is *primâ facie* proved by the testator's notes, and is not only not attacked by the executors, but has been admitted by them, and they cannot get discovery now on the chance of finding thereby ground upon which to attack or open the account: *Disney v. Longhbourne*, L. R. 2 Ch. D. 704. A party is not entitled to discovery till he has alleged a case

that will stand the test of demurrer. *A fortiori* he is not entitled when he alleges nothing at all. Here the objections may be of a kind which, even if admitted, the Court would not then open the account: *Kerr*, pp. 17, 18, 177; *Cashin v. Craddock*, L. R. 2 Ch. D. 140; *Reid v. Baldwin*, Esten, V. C., 22nd August, 1861; *Taylor's Chy. Orders*, note p. 185. Although there are no formal pleadings in the Master's office, yet the daily practice permits an issue being had: *G. O.* 232, 233, 237. The books and documents required are in constant use at the respondent's place of business, and cannot be removed without great inconvenience: *Taylor's Chy. Orders*, note sec. 4, p. 191. The warrant containing the directions appealed from was issued *ex parte*. The directions thereon are simply a repetition of previous rulings. If the respondents had complied with the directions of the Master, they would have been held to consent to opening of the account. As to the point raised for the first time on the argument of this appeal, that no affidavit on production was filed, the respondents' contention is, that they are not, upon the facts shewn, liable to produce at all. The great inconvenience of complying with his directions was urged upon the Master, was shewn on affidavit before him, and the respondents in their affidavits filed with the Master offered to allow inspection of "the books of their firm" whenever and as long as the appellants wished, and by themselves or by an accountant. It would therefore have been useless to apply to the Master to vary his direction, he having refused to do it on such material.

January 26, 1880. Moss, C.J.A., delivered the judgment of the Court.

Upon the application to set aside the Master's direction, the creditors gave an undertaking to permit inspection by the executors or their agent of their books and accounts in this matter at their place of business in Toronto, within reasonable hours, and to permit the executors to make extracts. This, in the opinion

of the learned Judge, was satisfactory, and he accordingly set aside the direction, with costs. But, with great respect, we think that this was not sufficient. The executors were clearly entitled to an affidavit, identifying the books and documents as being all in their possession relating to the claim. Without such an affidavit, the executors are at the mercy of the creditors. When they or their agent attend at the counting-house in Toronto, they have nothing upon which they can act. The creditors or their clerks may produce just such books and papers as they please, without check or safeguard. We have no fear that there would be any evasion of the undertaking in the present case, but it is our duty to lay down a rule of general application, and we therefore feel bound to hold that without a full and detailed affidavit on production, the undertaking should not be accepted as ground for relieving the creditors. It is, we think, regrettable that such a proposition was not made before the Master, or to the solicitors of the executors. It would have been more reasonable to make another application, founded on special grounds, before incurring the larger expense of an appeal to the Court of Chancery.

We cannot doubt that, upon its being shewn that the production of the books in his office would have been inconvenient or prejudicial to the creditors, without corresponding advantage to the executors, the Master would have relieved them from that part of his direction. For exempting them from the obligation to pledge their oath to the facts material to production, it appears to us that there was no reason.

The executors have not done more than their duty required, and they should not be made to suffer for their vigilance.

We think that the appeal must be allowed, with costs, and that upon the claimants making a sufficient affidavit on production, and giving an undertaking in the usual form to permit inspection of the books that are in constant use here, and paying the executors' costs of the application before the Vice-Chancellor, no further order need be made at present.

Appeal allowed.

BALLAGH V. THE ROYAL MUTUAL FIRE INSURANCE COMPANY.

Insurance—Uniform Conditions Act, R. S. O., ch. 162—Reasonableness of condition—Non-payment of premium note falling due after loss.

Under the statutory conditions endorsed on a mutual fire insurance policy the words, prescribed by sec. 4 of R. S. O., ch. 162, except the heading, "Variations in conditions," were printed in ink of a slightly different colour, but in the same sized type; and after certain conditions varying the statutory conditions, and under the heading, "Additional conditions," there was the following condition in type of the same size and colour, "In case any promissory note for a cash premium, or for any premium note * * given to the company, or to any officer or agent thereof, be not paid when due, the policy * * shall be null and void, and the company shall not be liable for any loss occurring either before or after the maturity of such promissory note." The note in this case, payable to defendants' agent or bearer, for \$12, the first payment on the premium undertaking, which was for \$15.62, fell due on the 15th of April, 1878, and the loss, exceeding the amount insured \$500, occurred on the 23rd of March. This note was not paid, the plaintiff alleging that he omitted to pay it, assuming that the defendants would deduct it in settling the loss, which had not been adjusted.

Held, that the Uniform Conditions' Act, R. S. O., ch. 162, (excepting sec. 2,) does not apply to Mutual Insurance Companies; but that if it did the condition would have been clearly void for non-compliance with section 4 of that Act.

Held, also, reversing the judgment of the Queen's Bench, 44 U. C. R. 70, that the condition was not just or reasonable, as it was required to be by the express contract, and by sec. 35 of the Mutual Insurance Act, R. S. O., ch. 161; and that the plaintiff was entitled to recover.

The reasonableness of a condition is to be tested with relation to the circumstances of each case at the time the policy was issued. But *quære*, *per* Moss, C. J. A., whether in the abstract such a condition could be regarded as reasonable, and *per* PATTERSON, J. A., it could not.

Per PATTERSON, J. A., the condition was also unreasonable, because more stringent than the statutory provisions upon the same subject, sec. 48 of the Mutual Act.

Quære, whether this was a note which the company had power to take, or one within the condition.

THIS was an appeal from a judgment of the Court of Queen's Bench, discharging a rule *nisi* to enter a verdict for the plaintiff, reported 44 U. C. R. 70. The pleadings and facts are stated there, and in the judgments in this appeal.

The case was argued on the 15th September, 1879 (a).

H. J. Scott, for the appellant. It is clear that R. S.

(a) *Present*.—MOSS, C. J. A., BURTON, PATTERSON, and MORRISON, JJ. A.

O., ch. 162, was intended to apply to Mutual Insurance Companies. The words used in that statute are: "Every policy of insurance,"—words sufficiently wide to include mutual companies. If, as we contend, it does come within R. S. O., ch. 162, then the condition relied upon by the respondents, and upon which a verdict was entered for them, did not form any part of the contract, as sec. 4 of the Act was clearly not complied with, the words "variations in conditions" not being added by the respondents to the statutory conditions, and the words contained in the section, commencing with "This policy," and ending with "Company," not being printed in conspicuous type, as required by the section: *Sly v. Ottawa Agricultural Insurance Co.*, 29 C. P. 28; *Sands v. The Standard Insurance Co.*, 26 Gr. 113; *Spice v. Bacon*, L. R. 2 Ex. D. 463; *Bowman v. Blyth*, 7 E. & B. 47; *Maxwell* on Statutes, 330. It is, however, immaterial whether R. S. O., ch. 162, applies to Mutual Insurance Companies or not, as it is provided by that statute, and also by R. S. O., ch. 161, sec. 35, that conditions which are unreasonable shall be null and void; and under either of these Acts the learned Judge who tried this case should have held this to be an unreasonable condition: *Gregory v. West Midland R. W. Co.*, 2 H. & C. 944; *Peek v. North Staffordshire R. W. Co.*, 10 H. L. C. 571; *In re Albert Life Assurance Co., Cook's Policy*, L. R. 9 Eq. 703. The nonpayment of the note given by the appellant could not forfeit the policy, the note being payable generally, and transferrable by delivery, and not such a note as the respondents were authorized to take. Besides, the conduct of the defendants, after the happening of the fire, was such as to estop them from setting up a forfeiture of the policy for the nonpayment of the note: *Benson v. Ottawa Agricultural Ins. Co.*, 42 U. C. R. 282.

Bethune, Q. C., for the respondents. The question whether there was a compliance with sec. 4 of R. S. O., ch. 162 cannot arise here, as that statute does not deal with mutual insurance companies, who are governed entirely

by R. S. O., ch. 161. A comparison of the two Acts completely establishes this. It will be found that while many of the provisions are similar in both Acts, they have different regulations in reference to the same subjects. The cases determined upon the construction of the Imperial "Railway and Traffic Act, 1854" have no analogy to a case of this kind, because by sec. 7 of that statute, all conditions are declared to be null and void, with a proviso that the companies may make such conditions as shall be adjudged by the Court before which any question relating thereto shall be tried to be just and reasonable. Even under ch. 162 the respondents submit that, inasmuch as the statutory conditions are general, the Court must, in pronouncing any variation or addition to these statutory conditions to be unjust and unreasonable, have regard to the justice and reasonableness of the condition as it may affect the greater number of cases. It cannot declare the condition unreasonable because it works a hardship in this instance. Under the circumstances it was not unreasonable and unjust to impose such a condition at the time of the making of the contract, because without prompt payment of their premium notes it would be impossible for the company to carry on their business, and they had a perfect right to make prompt payment a stipulation of the contract: *Lord v. The Midland R. W. Co.*, L. R. 2 C. P. 339; *Thompson v. Hudson*, L. R. 4 H. L. 1. The Court must determine the question of the justice and reasonableness of the condition as if the question had to be determined at the time the policy was issued, because the contract which is being enforced is one which was then made. The case of *Sands v. Standard Ins. Co.*, 26 Gr. 113, referred to by the appellant, is opposed to the weight of authority. The amount of the appellant's loss was not payable for a considerable period after the day on which the note became due. The respondents did nothing which ought to estop them from setting up the non-payment of the note; their silence cannot operate as a waiver: *Stickney v. Niagara District Mutual Ins. Co.*, 23 C. P. 372.

March 2, 1880. Moss, C. J. A.—The first question that seems to invite attention is, whether, assuming the validity of the condition upon which the defendants rely, it is applicable to the present transaction. Its terms are certainly very comprehensive. It has been framed with the astuteness and precision which come of long and patient study of the arts, by which a certain class of insurance companies aim at combining the collection of premiums with the non-payment of losses. At the time of the trial its use seems to have been a monopoly of this company, although its author observed, perhaps not without a trace of parental pride, that he had no doubt it would soon be adopted by a great many others. It provides that in case any promissory note for a cash premium, or for any payment or assessment on any premium note or undertaking given to the company, or to any officer or agent thereof, be not paid when due the policy shall be void, and the company shall not be liable for any loss occurring either before or after the maturity of such note. No doubt this is a drastic remedy to apply to defaulters, but searching as it seems, there are strong reasons for doubting whether it reaches the plaintiff's case.

It is proved that Charles Wisser, the defendants' agent at Walkerton, had frequently solicited the plaintiff, who resided at Teeswater, to insure his premises. Finding the plaintiff at Walkerton on the 12th of February, 1878, he exerted his powers of persuasion with such success as to induce the plaintiff to give him a risk of \$500.

The terms proposed to him required a cash payment of \$12.50 upon an undertaking of \$15.62, which formed the consideration for the insurance. As he had not sufficient money with him, Wisser accepted his own fees, whatever they were, fifty cents in cash, and a promissory note for \$12, payable to himself or bearer. He gave an interim receipt, in which he acknowledged a cash payment of \$12.50, and the note was sent to the defendants' head office. A policy under seal was subsequently issued, which states that "in consideration of the receipt of an undertaking

of \$15.62 and a first payment thereon of \$12.50," the plaintiff was insured. Before the note matured, the plaintiff's loss occurred, and he did not pay the note at maturity because he supposed the amount would be deducted from his claim. Perhaps it was irrational of him to expect the defendants to act upon this principle, but in dealing with ordinary persons the notion would not have seemed extravagant. I think that a Court would be quite justified in deciding upon the facts, that this note was not of the description contemplated by the condition, but had really been accepted as a payment in cash. For my own part, to prevent the miscarriage of justice which in my humble opinion the success of the defendants' contention would involve, it would cost me no effort to hold that they were estopped by the acknowledgment under seal from denying that it was a payment. But whether or not this ground is solid, it is not necessary for the support of the plaintiff's case.

The policy in question is governed either by the Act respecting Mutual Fire Insurance Companies, ch. 161 R. S. O., or the Act to secure uniform conditions in policies ch. 162 R. S. O. The argument before us mainly proceeded upon the assumption that it was subject to the provisions of the later Act. It is presumable from the endorsements that this is the view upon which the defendants affected to act in framing the policy. If that statute be applicable, I confess that I agree with the opinion of Mr. Justice Armour. An examination of the mode in which the variations and additions are presented to view, does not lead me to think that there has been a reasonable and substantial compliance with the requirements of the Act. On the contrary, it has left a decided impression that the intention was, while appearing to obey the letter of the statute, to evade its spirit. I find it difficult to believe that any company desiring fairly to direct the attention of its customers to the changes in the statutory conditions, which it desired to incorporate into the contract, would have adopted such a form or chosen such type. But it

seems to be unnecessary to pursue this inquiry further, because I agree with the argument advanced at the bar on behalf of the defendants, that mutual companies are not subject to the provisions of the Act to secure uniform conditions. At first sight the comprehensive language of that Act led me to suppose that every company, whether founded on the mutual principle or not, falls within its scope. This original impression received additional countenance from the well-known fact that it was certain mutual companies which had been the archoffenders in setting up defences denounced by the Courts as iniquitous, and in pursuing a course of resistance to honest claims, which had directed public attention to the necessity of legislative protection. But an examination of many of the uniform conditions and of many of the provisions in the Mutual Act covering the same ground, seems to shew that this position is untenable. Take for example the different regulations touching double insurances. By the Mutual Act it is provided that if an insurance subsists by the act or with the knowledge of the insured in the company and in any other office at the same time, the insurance shall be void, unless the double insurance subsists with the consent of the directors, signified by endorsement, on the policy signed by the secretary, or other officer authorized to do so, or otherwise acknowledged in writing. This makes a written acknowledgment, proceeding of course from proper authority, sufficient in every case of double insurance. But when the uniform conditions apply, if there be a prior insurance in another company, the assent must appear in the policy or be endorsed thereon, and a simple written acknowledgement will not avail (condition 8), as it will do in the case of a subsequent insurance.

Again, the 17th condition authorizes the commencement of an action at the expiration of thirty days after the completion of proofs of loss, while the 56th section gives the company three months after the receipt of proofs. It could scarcely be contended that any failure of a mutual company to comply with the Uniform Conditions Act would

destroy its right to defer payment for three months. But I need not elaborate this topic. I am not prepared to combat the views expressed by my brother Patterson, in the judgment which he will presently read, and in which he seems to demonstrate, both by a historical review of the course of legislation, and a reference to their divergent provisions, that the two statutes cannot be held applicable to the same class of insurance companies.

I assume, then, that the defendants were at liberty to insist upon conditions which they deemed necessary for their protection, and which should appear to be just and reasonable. They have themselves, in my opinion, defined the circumstances under which they are to be at liberty to set up the condition now in question. It is one of the "additional conditions," and these are introduced under a heading, which is in the following terms: "These variations and conditions are by virtue of the Ontario Statute in that behalf in force, so far as by the Court or Judge before whom a question is tried relating thereto, they shall be held to be just and reasonable *to be exacted by the company.*" Now it is true that the Act respecting mutual companies does not contain the expression, "to be exacted by the company," but I perceive no good reason for not treating it as a part of the contract, so far as the defendants are concerned. Even if this language had not been used, the same result might probably be reached upon the proper construction of the statute; but its use seems to me to make it clear that the question now to be considered is whether the defendants can, with reason and justice, under the actual circumstances of the case, insist upon the non-fulfilment of this condition. The deep respect which I feel for the opinion of the Chief Justice and Mr. Justice Cameron has alone created any doubt in my mind as to the answer which this enquiry should receive.

But I am less pressed with this consideration, because the attention of the Court below does not appear to have been directed to this special view. Both these learned Judges seem to have dealt with the abstract justice and

reasonableness of such a provision. Upon this topic it seems unnecessary to enter, although, to avoid misconception, it seems proper to observe that I am not at present satisfied that even upon that basis ought the condition to be upheld. But under the actual circumstances nothing could, in my opinion, be more unjust and unreasonable—I shall not employ any harsher epithet—than for the company to attempt to defeat this admittedly honest claim, by setting up the nonpayment of the note on the day it matured. Something might be said for them if it had been payable to the company at their office, and they had notified the plaintiff that they expected prompt payment. But it appears that although their usual practice was to advise the assured that his note was coming due, they refrained from giving the plaintiff any notice—a circumstance most justly characterized by Mr. Justice Armour as suspicious. Their communications to him about the adjustment of his loss naturally, and as I fear designedly, led him to believe that it would be settled without difficulty. It requires much charity to believe that the letters of their secretary were not deliberately intended to lull him into inaction. To my mind it is difficult to conceive how any company, clinging to the skirts of respectability could stoop to such a defence; and it gives me some satisfaction to feel that, in my humble judgment, I am not bound to assist in crowning it with success.

I think that the appeal should be allowed, with costs, and a verdict entered for the plaintiff for \$500 and interest, less the amount of the note and interest.

PATTERSON, J. A.—The loss by fire occurred on the 23rd of March, 1878. The policy bore date, 12th of February, 1878, and insured the plaintiff to the amount of \$500 for one year, “in consideration of the receipt of an undertaking for \$15.62, and a first payment thereon of \$12.50; * * subject, nevertheless, to the several conditions and stipulations endorsed hereon, which are to be taken as part of this policy, and the terms and provisions upon which the same is issued and will become payable.”

There were eight pleas pleaded by the defendants, but the only one of them which concerns us upon this appeal is the sixth. The issues upon the others have been found for the plaintiff, who now appeals against the decision, which is adverse to him, of the questions arising under the sixth. This plea is as follows :

6. And for a sixth plea, the defendants say that the said policy was made upon and subject to a condition thereon endorsed, that in case any promissory note for a cash premium or for any payment or assessment, or any premium note or undertaking given to the defendants or to any officer or agent thereof, be not paid when due, the policy in connection with which such promissory note shall have been given should be null and void, and the defendants should not be liable for any loss occurring either before or after the making of such promissory note. And the defendants say that the said plaintiff duly gave his promissory note, bearing date the 12th day of February, A.D., 1878, for the sum of \$12.00, and payable two months after the date thereof, to the defendants, for the first payment on the premium note or undertaking given to the defendants for the premium of insurance under said policy ; and the said promissory note remained in arrear and unpaid after the same became due, and was not paid either before, at or after the happening of the said alleged loss, by reason whereof the said policy became null and void, and the defendants are not liable for the said alleged loss in the declaration mentioned.

The plaintiff joined issue on this plea, and also replied specially in these words :

2. And for a second replication, on equitable grounds, to said sixth plea, the plaintiff says that after the said loss, and after the defendants had notice thereof, and up to the time said promissory note matured, the defendants repeatedly advised the plaintiff they would adjust said loss, and thereby induced the plaintiff to believe that said loss would be immediately adjusted and paid, and the amount of said promissory note deducted from the insurance money pay-

able to the plaintiff for said loss ; that the plaintiff, relying on the said promises of the defendants, neglected to pay said promissory note at maturity, but within a reasonable time thereafter, finding said defendants did not appear to adjust and pay said loss, he offered and tendered to defendants the amount of said note, who then, for the first time, repudiated their liability. And the plaintiff submits that under the circumstances, and at all events, the said condition in said 6th plea is not just and reasonable.

Issue was joined on this replication.

I understand the defendant company to be established under the present Act respecting Mutual Fire Insurance Companies, R. S. O., ch. 161. That Act embodies the Act passed in 1873 (36 Vic. ch. 44), to consolidate and amend the law relating to these companies, one object of which was to bring the operations of the companies back to the business of mutual insurance, and not to permit new companies to insure on the cash principle, as the then existing ones had for years been doing. Sec. 75 of the Revised Statute permits companies existing before the Act of 1873 to continue to effect cash insurances within certain defined limits. Sec. 55 forbids companies incorporated under the new Act issuing policies otherwise than on the mutual principle. New companies necessarily look to sec. 45 for their power, which is to accept premium notes or the undertaking of the insured, for insurances, and to issue policies thereon ; “ said notes or undertakings to be assessed for the losses and expenses of the company in manner hereinafter provided.” Then the two sections next following regulate the assessments ; the first of them empowering the directors to demand a part or first payment of the premium note or undertaking at the time that application for insurance is made ; and declaring that such first payment may be in cash or by promissory note, and may be credited upon said premium note or undertaking, or against future assessments.

The policy before us describes the consideration or premium for the insurance as “ an undertaking for \$15.62, and

a first payment thereon of \$12.50." It strikes one at first sight as a somewhat grotesque use to make of the power to take a first payment on account of the premium in cash, leaving the rest to be called in by instalments as required, to make the cash instalment \$12.50, or 80 per cent., and leave only \$3.12, or 20 per cent. to be the subject of future assessments. The idea one would attribute to the Legislature in passing the Act is that the bulk of the premium note would remain for the regular assessments, as the mutual system suggests, and that the cash payment to be demanded was to be a comparatively small proportion. This demand of the larger sum looks very like effecting an insurance on the cash principle under cover of the form of a mutual insurance, and has the appearance of a fraud upon the statute, or an attempt to evade its spirit and intention while making a show of compliance with the literal reading of its language. This aspect of the transaction may have an influence on the consideration of the reasonableness of the condition, which we have to discuss.

How the company regulate this cash payment, or by what action or on what principle the amount of it is determined, is part of the history which is not told by the evidence. What does appear is that a Mr. Wisser, who acted as agent for the company, took the plaintiff's application, to which I understand the undertaking for \$15.62 was appended, and gave the plaintiff to understand that he was to pay \$12.50 cash, besides the agent's commission. It was not convenient for the plaintiff to pay the cash, and therefore what was agreed on between him and Wisser, and actually done by him, was to pay the agent's commission and fifty cents in cash, and to give his note at two months for \$12. The note ran thus: "February 12, 1878. Two months after date, I promise to pay to C. Wisser or bearer, twelve dollars, at Hamilton, value received." This note seems to have been transmitted by Wisser to the office of the company at Hamilton. It fell due on 15th April, 1878. The fire occurred on 23rd March. The plaintiff did not pay the note when due, expecting the defen-

dants to retain the amount of it out of the insurance money; but after the note was overdue, when the plaintiff, apparently becoming alarmed, sent the amount of the note to the defendants' office, it was returned to him with an intimation that under one of the conditions of the policy the plaintiff's failure to pay the note at maturity freed the defendants from liability to pay his loss. In the meantime correspondence or communications had been passing between the plaintiff and the secretary of the company with reference to the adjustment of his loss, and for my own part I think there are very strong grounds apparent upon the whole transaction for imputing to the secretary the design imputed to him in the judgment of Mr. Justice Armour, to lie by and keep the matter open until after the note should have become due, with the prospect of the plaintiff overlooking the necessity of paying it punctually, and so furnishing a pretext for refusing to pay him his insurance money.

The condition, which is that set out in the sixth plea, is one of those printed on the back of the policy under the heading, "Additional Conditions." It is in these words:—

"1. In case any promissory note for a cash premium or for any payment or assessment on any premium note or undertaking given to the company, or to any officer or agent thereof, be not paid when due, the policy in connection with which such promissory note shall have been given shall be null and void, and the company shall not be liable for any loss occurring either before or after the maturity of such promissory note."

The defendants insist that under the terms of this condition they are freed from liability.

They say the note was for a payment on a premium undertaking given to the company, or to an officer or agent thereof, which contention is, however, challenged by the plaintiff. They further say the note was not paid when due, which may be literally true; and they then point to the terms of condition, which declare that in these circumstances the company shall not be liable for any loss occurring either before or after the maturity of the note.

Passing over, for the moment, whatever questions are raised as to the facts relied on as breaches of the condition,

we may notice certain objections urged on the part of the plaintiff to the right of the defendants to insist upon the condition.

One of these is, that the condition is not one of the uniform conditions provided by the Act, R. S. O. ch. 162, but is an additional condition ; and that the requirements of that Act have not been complied with by adding to the Statutory Conditions, "in conspicuous type, and in ink of different colour, words to the following effect : Variations in conditions. This policy," &c., &c.

The words "variations in conditions" are altogether omitted. The other words are there, but in type which is far from conspicuous, and in ink which differs in shade from that in which the statutory conditions are printed chiefly by being more indistinct and less easy to be read. And although there are the words "additional conditions" printed as a heading to certain conditions which follow, not the statutory conditions, but the variations, those words neither are the same as what the statute requires, nor, in my judgment, to the same effect ; nor are they *added* to the statutory conditions in the way that expression is obviously used, meaning immediately following them, but occur in a different place, and in a different connection. I can discover neither compliance nor intention to comply with the statute in what I see on the policy. On the contrary, I find conditions open to all the objections so frequently and forcibly urged against those which insurance companies were accustomed to print on their policies in a form and shape calculated to deter insurers from attempting the task of reading them—a task only to be accomplished by the aid of good light and perfect eyesight—and which conditions, if deciphered, were not likely to be fully comprehended without great attention and patience. I confess to deriving from the appearance of these conditions the same impression which I received from the so-called payment on account of the premium, viz., that the object and design were to evade the statute, and not to honestly comply with it. *Sands v. Standard Ins. Co.*, 26 Gr. 113, before Proudfoot,

V. C., was a suit against the company which is mentioned in the evidence before us as being managed by the same secretary, and represented by the same adjuster or inspector as the company which is defendant in this case. The difference between the two companies seems to be that the Standard does not profess to be a mutual company. But, amongst other points of similarity, they appear to pursue the same course in their mode of printing their conditions. I refer to the remarks of the learned Vice-Chancellor in that case, and to those of Mr. Justice Armour in this case, for the purpose of saying that I entirely concur with them (a).

But the defendants answer the plaintiff's objection to the non-observance of the requisites of ch. 162, by contending that they are not within the purview of that Act, because they are a mutual insurance company governed by ch. 161.

In my opinion that contention is well founded. I think it is impossible, consistently with true principles of construction, to read the two chapters, 161 and 162, as applying to the same class of insurance companies. It is true the language of ch. 162 is general. It is not even confined to companies, but will equally apply to individual underwriters or insurers. But its provisions are so framed as to point more directly to insurances on the cash or stock principle, and contain no express reference to mutual companies, though in their terms capable of being applied to companies of that description; and at the same time we have in ch. 161 a complete system of law provided for mutual companies formed under that or other statutes of the province, covering in many instances the same ground occupied by ch. 162, but not always dealing with the same subjects in the same way as the later Act. I shall refer to some of these variations, but shall first glance at the history of the two statutes, as I think it shews that they were not designed to be both in force with respect to mutual companies.

(a) See also S. C. affirmed on rehearing, 27 Chy. 167.

In 1873 the Act, 36 Vic. ch. 44, was passed to consolidate and amend the laws having reference to mutual fire insurance companies in the Province of Ontario. These companies had been originally authorized by the Statute of Upper Canada, 6 Wm. IV. ch. 18, which was passed "to authorize the establishment of mutual insurance companies in the several districts in this Province." The scheme of that statute was practical, useful, and simple. It may be described in a few words as enabling the farmers of each district to associate for their mutual protection or insurance against losses from fire. By degrees the original idea was departed from until it came to be quite lost sight of. Statute followed statute in rapid succession, making amendments of one kind and another, in most of which it is easy to trace, as the guiding principle, the interest of the officials concerned in conducting the companies, but by no means easy to discover any desire to adhere to the idea which first called the companies into being. Their operations were extended beyond their nominal territorial limits, and their business became essentially a cash insurance business, though conducted in the name and with some of the forms of mutual insurance. The Act of 1873 introduced several amendments. Amongst other things, it aimed, as I have already noticed, at confining new companies to the conduct of business on the mutual principle; but it did not attempt to return to the idea of making the company an association of the residents of a particular locality for their mutual protection, though for some reason, not apparent to me, it required thirty freeholders of a municipality to be concerned in the formation of a company. The changes which most concern us were in the matter of conditions, or enactments analogous to conditions of insurance. Amongst these was section 33, which provided that "every condition endorsed upon or affecting any policy of insurance, which shall be held by the Court or Judge, before whom any question relating thereto shall be tried, not to be just and reasonable, shall be absolutely null and void."

No such provision as this existed at that time with

respect to any insurance companies except those governed by this Act. But in 1874 an Act was passed (38 Vic. ch. 65), which authorized the issue of a commission to three or more persons holding judicial office in the province, for the purpose of determining what conditions of a fire insurance policy are just and reasonable, and provided that after such conditions were framed and approved, any other conditions contained in any policy, if held by the Court or Judge before whom a question relating thereto should be tried to be not just and reasonable, should be null and void. This provision was couched in language sufficiently general to include mutual companies; but the next clause of the statute showed that it was not so intended, for it provided that "a decision of the Court or Judge under this Act, or under the 33rd section of the Act to consolidate and amend the laws having reference to mutual fire insurance companies in the Province of Ontario, shall be subject to review or appeal to the same extent as a decision by such Court or Judge in other cases;" thus dealing with the two Acts as independent of each other, though *in pari materia*.

The conditions were framed by the commissioners; but in place of permitting them to receive effect by proclamation, as proposed by the Act of 1874, the Legislature in 1876 passed the Act 39 Vic. ch. 24, which is now contained in ch. 162 of the Revised Statutes. That Act (sec. 3,) contained this provision, "A decision of a Court or Judge under this Act shall be subject to review or appeal to the same extent as a decision by such Court or Judge in other cases;"—thus leaving the case of mutual companies to be governed by the similar clause in the Act of 1874.

I think it is apparent from these references that, even before the revision of the statutes, the idea of the Legislature was that the Uniform Conditions Act did not apply to mutual insurance companies.

Then we find in the Revised Statutes the two Acts kept separate and re-enacted in that shape, the amendments made by subsequent Acts to the Act of 1873 being incorporated with the original provisions and carried into ch.

161. Thus sec. 35, which represents the original sec. 33, contains the amendment of 1874, making the decision of the Court or Judge subject to review and appeal.

Comparing the conditions given in ch. 162, with the provisions of ch. 161, we find a number of instances in which they refer to the same subject but differ in their effect. I may note those to which I allude without in all cases stopping to point out the points of variation, as these are at once apparent on reading the enactments together. These are condition No. 3 and section No. 42, respecting changes or alterations affecting the risk: Condition No. 4 and sec. 41, touching assignment or alienation of the property insured: Condition No. 8 and secs. 39-40, on the subject of double insurance: Condition No. 16 and sec. 57 providing for arbitrations: Condition No. 17, which makes a loss payable in 30 days after proofs, and sec. 56, which gives three months: Condition No. 19 and sec. 44, which prescribe the mode in which the company may relieve itself from further liability on "a policy: and Condition No. 22 and sec. 58, which agree in fixing one year after the loss, as the period of limitation for bringing actions; but sec. 58 saves disabilities, and moreover contains a direction which these defendants have not observed, viz., that all policies issued by the company shall have a condition to the effect of that section endorsed thereon.

Another illustration of the incongruity of holding the provisions of ch. 162 respecting conditions to apply to mutual companies, is furnished by this very policy, for we find among the *variations*, which are introduced with the statutory notice that they are in force so far as by the Court or Judge they shall be held to be just and reasonable to be exacted by the company, some of the clauses of the Mutual Insurance Act, as *e. g.*, sec. 41, relating to alienations, and sec. 44, regulating the cancellation of policies. No Court or Judge will assume to criticise the justice of the provisions of an Act of Parliament, or to enquire whether a company may reasonably exact as a condition that which is declared by statute to be the law. One other point

touching this topic may be noticed. The Act, ch. 162, fixes as the consequence of non-compliance with its terms, and as it has been construed in this Court, that the insured holds a policy without any conditions binding upon him, although the insurer is bound by those contained in the statute. This cannot be asserted of a mutual policy under ch. 161, which is at all events subject to the express enactments of the statute; and if these are not properly called conditions, it must have at least one condition endorsed upon it in obedience to sec. 58, to which I have just adverted, and another embodying sec. 44, which contains a similar mandate.

In my opinion therefore we have to lay aside ch. 162, so far as it relates to the conditions endorsed on the policy, and determine the questions raised under ch. 161 alone.

I say nothing of the second section of ch. 162, which is from the Act of 1874 (38 Vict. ch. 65,) and does not relate to the character of the conditions. There may be no reason against applying it to all insurances; and it was doubtless originally intended so to apply.

The objection, under sec. 35 of the Mutual Insurance Companies Act ch. 161 is, that the condition is not just and reasonable.

This question is raised by the replication, and we must take it to have been decided in favour of the defendants by the Judge at the trial, as he found on the sixth plea and all the issues thereon for the defendants. There is, therefore, no foundation for the contention, advanced but not much insisted on by Mr. Bethune, that as sec. 35 authorizes an appeal only when the point has been decided at the trial, it was not properly before us.

A preliminary question is, from what point of view is a condition to be looked at in determining its justice and reasonableness? Is it to be regarded in its general effect, or with reference only to the circumstances of the case in which it is relied on? There are strong grounds for adopting the latter alternative. It is only as it affects an individual policy that it can ever be questioned at a trial,

and it is reasonable, and seems to me to be what is contemplated by sec. 35, that it shall be tested in each case with relation to the circumstances. Referring to the provisions of ch. 162, which, though they may not govern companies formed under ch. 161 are yet in *pari materia*, we find the expression "just and reasonable to be exacted by the company." Taking the condition now in question as an example, let us suppose the case of an insurer giving his premium undertaking or promissory note, payable to the company only, and at the company's office, so that there is no uncertainty either as to the time when or the place where it is to be paid. It may be very reasonable to exact from him the agreement that if he fails to perform his part of the contract the company shall be free from liability. But if the note taken from him is of a different kind, if it is negotiable and payable generally, so that neither he nor the company may be able to tell where it will be when it matures, or to whom it has to be paid, nothing could be more unreasonable than to exact as a condition of his right to recover from the company, who may have parted with the note, perhaps receiving its full amount from their transferee and being under no risk of loss if it should never be paid, that he shall pay the note on the very day it matures.

If this condition is to be judged by its possible effect without regard to the circumstances of the particular contract, I do not doubt that it should be held to be unjust and unreasonable.

If looked at as applying to a note such as that in question before us, I mean one taken in the form of this one, payable generally, and payable to Wisser or bearer, I also think it unjust and unreasonable. I regard it as of the time when the policy was made. It is as of that moment, as I apprehend the statute, that we must look at it to determine the question. If unreasonable then, it would not, in my opinion, be cured by the circumstance that, under the facts as they ultimately turned out, it was not necessarily productive of injustice. It was not reasonable for the company to exact it.

There are other grounds on which I think this condition unjust and unreasonable. One of these is, that it imposes a penalty for default of payment at the day in excess of that imposed by section 48 of the statute. That section declares that if the assessment on the premium note or undertaking upon any policy is not paid within thirty days after the day on which the assessment has become due, the policy of insurance for which such assessment has been made shall be null and void as respects all claim for losses occurring during the time of such non-payment, but shall be revived when the assessment has been paid, unless the secretary gives notice to the contrary; but nothing shall relieve the assured party from his liability to pay such assessment or any subsequent assessments, nor shall such assured party be entitled to recover the amount of any loss or damage which happens to property insured under such policy while such assessment remains due and unpaid, unless the board of directors in their discretion decide otherwise. The wide difference between this and the condition in question is at once apparent from the reading of the two; and it becomes more pronounced when we read with the condition the 20th statutory condition, which is also endorsed on this policy, and under the terms of which the stringency of the condition could not be relaxed even by a vote of the board of directors, unless the waiver were clearly expressed in writing signed by an agent of the company.

I think the measure of justice in dealing with a default in payment must be taken to be fixed by the statute, and that it is not just or reasonable that the company should exact more onerous terms from its customers. I do not dispute the right of mutual insurance companies to frame conditions which their statute does not provide. It was long since decided that they were not prohibited from imposing reasonable conditions to guard themselves against frauds: *Langel v. Mutual Ins. Co. of Prescott*, 17 U. C. R. 524. This statute recognises that right, while, by section 35, it insists in the most emphatic way that they

shall be just and reasonable. It is, in my judgment, quite out of the question to hold that, in the view of this statute, any condition can be just and reasonable which, in any of the particulars dealt with by the statute, assumes to impose a heavier burden or a more stringent rule than that which would have to be sustained or obeyed under the terms of the statute itself.

This principle is enforced by the circumstance that section 48 is itself a modification of a former statutory provision, 29 Vic. ch. 37, sec. 5, which was more penal in its character, and approached more nearly to the effect of the condition we are considering.

Another reason is founded on the character of this particular transaction, in which, under the name of a first payment on account of the premium undertaking, the company demands eighty per cent of the whole year's premium. In the original constitution of these companies, under 6 Wm. IV. ch. 18, it was required, by sec. 12, that a part of the note, not exceeding five per cent., should, immediately upon the giving of the note, be paid to the treasurer, for the purpose of discharging the incidental expenses of the institution. In 1853 the limitation of five per cent. was removed, and the directors were empowered to determine the part to be paid; but it was still expressly confined to what was required for the purpose of discharging the incidental expenses of the institution: 16 Vic., ch. 192, sec. 3. It is true that the language of the present Act, sec. 45, leaves the power of the directors more at large, for it simply permits them to demand a part or first payment of the note or undertaking. But the directions which follow concerning assessments to meet losses, indicate that while a larger range is given to the discretion of the directors, there has been no change of policy, at all events to an extent which would justify a suggestion that the part or first payment contemplated was anything like the substantial payment of the whole premium. Therefore, even if obliged to hold that the course adopted here is within the letter of the statute, so as to make a transaction on that

basis valid as between the parties when voluntarily entered into and agreed to by both, I should require much more cogent reasons than any presented in this case before I held it just and reasonable that the company should insist on compliance with the terms on pain of forfeiture of all claims for losses occurring either before or after default if the note given for the extortionate demand were not paid at the day. I continue to give to the words "just and reasonable" the force indicated in the cognate statute by the added words "to be exacted by the company," and to test the reasonableness of the condition by treating it as one exacted by the company, not as one willingly and voluntarily agreed to by the insured.

For these reasons I do not think the condition can properly be allowed to stand in the way of the plaintiff's recovery.

It has further been contended for the plaintiff that the condition has not been broken; that in fact it is not true, as alleged in the sixth plea, that the plaintiff duly gave his promissory note for the first payment on the premium note or undertaking given to the defendants for the premium of insurance under the policy.

It is urged that the note is not one which the company could properly take; and that the legal result of the transaction, the giving of the note to Wisser, and the acceptance of it from Wisser by the defendants, was a payment by the plaintiff of the \$12 on the premium undertaking, and the acceptance by the company of the promise to pay, as something outside of the insurance contract. My opinion inclines towards this view, but the point was not very fully argued, and I do not wish, without more discussion of the various considerations involved in it, to pronounce upon it decidedly one way or other.

I do not observe in the present Act any express power given to take notes, except notes payable to the company. There is no necessity for premium notes or undertakings being negotiable, as they are clearly intended to be retained by the company. Under the old law there was an express statu-

tory declaration, 4 & 5 Vic. ch. 64, sec. 4, that nothing in the twelfth section of the Act 6 Wm. IV, ch. 18, should be construed to prevent any promissory note 'deposited with any mutual insurance company from being made payable to any officer of the company, or to any person or persons, for the purpose of being indorsed by such person or persons in favour of, or to such company or any officer thereof. This seems to have been dropped in 1853, in the section which was substituted by 16 Vic. ch. 192, for the former sec. 12, but it was restored in the Cons. Stat. of U. C., ch. 22, sec. 21. I do not observe anything equivalent to it in the present law. Possibly its omission may be significant of an intention to confine the power of the companies to taking notes payable only to the company : See *McArthur v. Smith*, 1 App. 276.

That reading of the statute might remove one of the objections to the reasonableness of the condition, but it would remove this note from its operation. It would not stand in the way of the collection of the note by the company ; as, I apprehend, there is nothing to prevent the company taking a note for a debt, and holding and enforcing payment of the note, as any individual might do. But, in taking notes for premiums or payments on account of premium undertakings, in pursuance of a statutory power, and making them the subject of a condition which imposes a forfeiture for non-payment of them at the day, the company should be confined strictly, and the condition should be construed strictly as referring to such notes only as are clearly within the contemplation of the statute.

I do not decide upon this ground. I merely indicate the present direction of my opinion upon it. My judgment proceeds upon the other grounds which I have explained.

I think the appeal should be allowed, with costs, and the rule made absolute to enter a verdict for the plaintiff.

BURTON, and MORRISON, JJ.A., concurred.

Appeal allowed.

THE BARRIE GAS CO. v. SULLIVAN.

Entire contract—Custom.

The defendant agreed with the plaintiffs to sink an artesian well at seventy-five cents a foot. After sinking a distance of one hundred and sixty feet, he met with an impediment, and refused to proceed further. *Held*, reversing the decision of the County Court, that he was entitled to be paid for the work done, as the evidence did not shew an agreement that he should receive nothing unless he succeeded in finding water. *Quære*, whether evidence as to how contracts for artesian wells were usually made in Barrie should have been received.

APPEAL from the County Court of the County of Simcoe.

The plaintiffs sued for \$100 for calls on stock held by the defendant in their company.

The defence was, that the defendant paid the amount by work done for the plaintiffs in boring an artesian well.

The learned Judge, who tried the case without a jury, made the following statement of the facts found by him :

1. I find that the defendant is indebted to the plaintiff in the sum of \$103.95 for calls on his shares in the plaintiffs' company, and interest thereon.

2. That the defendant solicited the plaintiffs' manager for the job of putting down an artesian well at the plaintiffs' gas works, to enable him to pay his calls in this way.

3. That a contract was made between the parties to sink the well at 75 cents per foot, and to supply pipe therefor at 31 cents per foot.

4. That before, and at the time the contract was made, the defendants knew that the plaintiffs required the well to be an overflow well for the purpose of preventing their gasometer from freezing, and was so told by the plaintiffs' manager.

5. That about the time the contract was made, and before it was made, the plaintiffs' manager asked the defendant how deep he would have to go with the well : that defendant replied he thought 130 to 140 feet, and referred to water being got at similar positions in Barrie : that plaintiffs' manager told the defendant he thought he would have

to go much deeper than other wells in Barrie : that to this defendant replied he thought not, from the lay of the ground on the plaintiffs' premises.

6. That there was no express undertaking by defendant to sink till he got an overflow of water.

7. That such a well was sunk in Barrie to 190 feet before an overflow was obtained, but that a depth of 160 was the greatest depth known to the defendant.

8. That the defendant proceeded to sink an artesian well on plaintiffs' premises on the above agreement.

9. That a hole to the depth of 36 feet, sunk by the defendant, was not properly done, owing to want of judgment in doing it, and the work had to be abandoned and is of no use to the plaintiffs.

10. That the defendant sank a second hole, which ultimately reached 160 feet deep, and in which there is that length of piping.

11. That 131 feet was sunk when an impediment, without fault of defendant, made it necessary to take up the pipe : that in resinking 81 feet of this 131 feet required to be resunk, and was resunk to reach the depth before mentioned of 160 feet, when an impediment again occurred, which makes it necessary to take up the pipe again to attain a greater depth : that this impediment was without fault of defendant : that the work in the last hole was done in a proper manner.

12. That the plaintiffs wished the work of sinking deeper to go on, but that the defendant quitted the work of his own accord : that he knew plaintiffs wished him to go on and sink deeper.

13. That it was by reason of the defendant's default that the work did not go on.

14. That the second hole sunk by the defendant does not serve the purpose for which it was designed, to the knowledge of both parties : is not an artesian well and is of no use to the plaintiffs.

15. That the amount of the work done by the defendant at the prices agreed, with material, would be \$243.85.

16. That the plaintiffs' manager was authorized to act for plaintiffs.

17. That nothing was asked by defendant, and nothing was paid to him, during the time he worked for plaintiffs, or since.

Evidence was given on behalf of the defendants to prove that in contracts for sinking artesian well in Barrie, the custom was for the proprietor to pay the price agreed on, whether water overflowed or not, for every foot sunk, unless there was a guarantee.

A verdict was entered for the plaintiffs, and after argument in term was sustained, the plaintiffs agreeing to credit the defendant with \$54.10 for pipe and materials supplied by him.

The decision proceeded upon the ground that the defendant had contracted to sink a well which should overflow, and while the price was to be at so much a foot, it was not payable until the completion of the work. The view of the learned Judge will be best given in his own words. He says: "I rendered a verdict for plaintiffs because I thought the contract proved was an entire contract not completed, and that payment was not contemplated till the job was completed and an overflow well secured. The main question argued on this rule is, whether upon the facts I was justified in giving a verdict for the plaintiffs. If the contract was an entire contract, the defendant of course would be entitled to nothing till it it was fully performed, and I must think say I that it was such—an entire service at so much a foot—and so understood by both parties. The object and nature of the work contracted for, and the conversation between the defendant and the plaintiffs' manager at the time of making the agreement, goes, to my mind, clearly to show this. The defendant, on his own knowledge of such work, and having sunk other wells of the kind in Barrie, was willing to undertake to give the plaintiffs what they required for their purpose—of which he was aware—an overflow well. His judgment led him to think he could get it by going

no deeper than other wells were sunk in Barrie, and this, notwithstanding the plaintiffs' manager expressed his belief that defendant would require to go much deeper. The defendant was mistaken, however. He declined further work, the work done being of no value to the plaintiffs, and even if the effect of the contract was that the defendant was to sink only a reasonable depth to try for an overflow, I do not think he did sink a reasonable depth, having reference to the evidence as to the depth that other like wells in the neighbourhood were sunk before an overflow was obtained, and what the defendant did towards it."

The matter presents itself to my mind in this way. The defendant, with full knowledge of what he was about, engaged to sink a well for plaintiffs to give them an overflow, and the only way in which the rate of remuneration could be fixed was by the foot, unless a lump sum was agreed upon for the job, which would be a very speculative thing, and might not be at all a fair basis for pay. The defendant himself, I believe, knew he was not to be paid till the work was completed, and that view is largely supported by his not having asked or received anything on the work as it progressed, though he was himself daily disbursing to workmen while the work was going on. * * In considering the question how the rule should be disposed of, one fact stands out prominently: the plaintiffs derived no benefit whatever from what had been done. A hole is sunk in their land of no benefit whatever to them. It is true the defendant, if he does not go on, may be in the hard position of losing all his labour. I felt this and pressed upon counsel, before the rule was moved for, or the case argued, the desirability and fairness of some arrangement being made that might save this, and offered a suggestion in that sense which I thought would be acted on; but for some reason it was not, and so I am brought reluctantly to determine the mere question of law arising on the facts.

I repeat, I think the contract proved, and to be collected from my findings is an entire contract, to sink an artesian

or overflow well, and that no payment was contemplated to be made till the work was completed, and that both parties understood this. The defendant was over sanguine and somewhat at fault in judgment. I found all the facts which occurred to me as material, or that either of the parties suggested to me."

From this decision the plaintiffs appealed.

The case was argued on the 13th January, 1880 (a).

F. E. P. Pepler, for the appellant. The evidence clearly shews, in fact it is admitted and found, that the contract was to bore or sink for an artesian well, at a certain price per foot, for a wholly indefinite and unnamed depth, and that there was no stipulation or condition that payment should be withheld until the completion of the work, as indeed it could not well be with the depth and extent of the work undefined, and even the possibility of a successful boring and an overflow of water in doubt. It is also admitted and found that there was no guarantee or stipulation that water should be found, and in fact the plaintiffs' president himself admitted that he did not even ask for such guarantee, and that he was not even certain himself of getting an overflow. On this state of facts it is submitted the law is clear that defendant was merely working by the foot, and was entitled to be paid *pro ratâ* for the work done by him: *Roberts v. Havelock*, 3 B. & Ad. 404; *Menetone v. Athawes*, 3 Burr. 1592; and again, *Appleby v. Myers*, L. R. 2 C. P., per Blackburn, J., pp. 659 and 660, "The general rule is, unless the contract provides to the contrary, that the workman is to be paid for the work." The case of *Sinclair v. Bowles*, 9 B. & C. 92, does not militate against this view, and is reconcilable with the other authorities, it being an express contract for an entire, clearly defined, and certain job. This case being brought within the above rule of law by

(a) *Present*—MOSS, C.J.A., PATTERSON and MORRISON, JJ.A.

the complete absence of any stipulation for a complete and defined job and for the withholding of payment till its completion, it is submitted that no such implied condition or stipulation can be raised to the defendant's prejudice, as found by the learned Judge of the County Court; and further, that even if it could, the evidence, so far from warranting it, clearly shows the contrary. The very fact of the assumption of control of the work by the plaintiffs generally, and their agreeing during the progress of the work to pay for drawing pipes, resinking, &c., and the plaintiffs' admission as to the doubt about the overflow, are sufficient to repel such an implication. The pushing of plaintiffs' contention to an extreme would evidently land the parties in an absurdity, as in view of the possibility, and indeed not infrequent occurrence, of the entire failure in certain spots to find overflowing water at all, the defendant could insist on going on for all time sinking by the foot at plaintiffs' expense, and on the other hand the plaintiffs could compel the defendant to proceed for ever without pay. It is submitted with confidence, that with an open contract such as this was the defendant could at any time, in view of the plaintiffs' possible inability to pay, stop and refuse to proceed further until paid for what he had done: *Button v. Thompson*, L. R. 4 C. P., 330; *Walsh v. Walley*, L. R. 9 Q. B. 367; *Menetone v. Athawes*, 3 Burr. 1592; *Taylor v. Laird*, 1 H. & N. 266. Even under this contract, supposing the defendant voluntarily ceased working against plaintiffs' wish, it was justifiable, and at any rate does not disentitle him to pay for work done; and even if such quitting could by any possibility be considered a breach of the contract on defendant's part, yet if by the contract any moneys are due, a subsequent breach of the contract by the party entitled will not divest the cause of action thus vested. See *Taylor v. Laird*, *Button v. Thompson*, and *Walsh v. Walley*, already referred to; and in reference to cases of hiring see *Bayley v. Rimnell*, 1 M. & W. 506: "If there is no specific contract of hiring, but merely proof of service, and it is shewn that the party

voluntarily quitted his employment, he will be entitled to be paid for his services up to the time of his so quitting ;” and at any rate the defendant is entitled as on a *quantum meruit* : *Foster v. Wilson*, 27 C. P. 543. It has been contended by the plaintiffs that at any rate it was in effect a contract for a reasonable depth, in view of the conversation between the parties as to the usual depth in town, but even if so, in the absence of a stipulation withholding payment till its completion, the defendant is still, according to *Roberts v. Havelock*, 3 B. & A. 404, and the authority of the cases previously cited, entitled to be paid as he proceeds. At any rate, in this case it is submitted that the defendant has actually exceeded a reasonable depth, inasmuch as he proceeded some twenty-five feet deeper than the greatest depth discussed between them, and as deep as the deepest well known to him. It is submitted that the learned Judge improperly ignored the evidence of usage or custom. Such usage or custom, if acted on, would have effectually disposed of the case in the defendant’s favour ; and it is strongly urged such evidence should not have been assumed to have been confined to the Barrie district, but the usage was proved in the only way it could well be proved by witnesses, who spoke of the usage so far as their knowledge extended, and such evidence should have been acted on in default of rebutting evidence by the plaintiffs. The learned Judge erred in holding that in view of the silence of the parties in the contract as to such usage it was not in their minds, and did not form part of their contract, as “usage in a particular trade will be taken to form part of the contract in the absence of evidence to the contrary” : *Metzner Bolton*, 9 Ex. 518. The evidence does not justify the learned Judge in finding that the thirty-six feet of boring (being the first well) was improperly done, and in not distinctly holding defendant entitled to the price of the pipes supplied. He also cited *Taylor* on Evidence, 4th ed., 1076 ; *R. & J.’s Digest* “Custom.”

McMichael, Q.C., for the respondents. The facts, as found by the learned Judge, shew that this was an entire

contract to sink an artesian well, and that payment was not contemplated, till an overflow well was obtained. The agreement was, not that he should be paid for every foot that he sunk, but that he was to make an artesian well at so much a foot. This is the only conclusion that it is possible to come to on the evidence. We cannot bring an action for damages against the defendant for not going deeper and finding water, as there is an impediment in the way; but it also prevents him from recovering as on a *quantum meruit*.

March 2nd, 1880. Moss, C. J. A.—The respect due to any opinion of the able and experienced Judge of the County Court, and his learned exposition of the grounds upon which his judgment is rested, has made me anxiously scrutinize the considerations which seemed to point to a conclusion opposed to that at which he arrived. I confess that my first impression was in favour of his view, but a careful examination of the evidence leads me to think that it cannot be affirmed. After considering the evidence, and especially that of the defendant and Mr. Shortreed, I am unable to say that the defendant ever agreed that he should receive no remuneration unless he succeeded in finding water. On the contrary, I think that the fair result of the whole evidence is, to negative such a contract. The circumstances seem to me to exclude the theory that he assumed the whole risk of the undertaking, or that success was a condition precedent to compensation. It cannot be that if some irresistible cause had forced him to stop boring at a point a yard above that at which water would have been reached, his labour must have gone unremunerated. It is true that it is found by the learned Judge that the hole he has sunk is of no use to the plaintiffs, but I apprehend that that must mean in its actual condition. Comparatively little labour and expenditure may make it answer the purpose they had in view. I do not think that the defendant's abandonment of further working notwithstanding the plaintiffs' desire that he should

sink to a greater depth, disentitles him to be paid for what he has actually done. The result of that conclusion would be, that the plaintiffs could insist upon his going on indefinitely before he could claim any compensation—a proposition quite untenable if he did not engage to find water. In fine, I think that the plaintiffs have entered into an agreement so vague and undefined that it does not avail to destroy the ordinary right of the labourer to receive his hire.

I prefer not to express any opinion upon the question, which seems to me to be one of some delicacy, whether the evidence of an alleged custom was rightly rejected or not considered. There is much force in the views expressed by the learned Judge of the County Court, and as the question was not very fully discussed at the bar, and is not essential in my opinion to a disposition of the appeal, I prefer to leave it in abeyance.

I think that the defendant is entitled to judgment for \$139.90.

PATTERSON, J.A.—If it is the proper conclusion of fact that the defendant contracted to supply the plaintiffs with a flowing well before he was to be paid for any work done upon it, there can be no question that the law has been correctly applied, and that he must fail in his defence to the present action.

It may not be beyond controversy that he did make himself responsible for the success of the attempt to find water. There is a good deal to be said in favour of the other view hinted at by the learned Judge, that he only agreed to sink to a reasonable depth to try for an overflow. But, whatever was the extent to which he bound himself to proceed, it does not necessarily follow that he was to be paid nothing as he went on. Undoubtedly it was competent for him so to contract if he chose to do so. The question is, did he so contract: and that question is not conclusively answered against him by showing that he bound himself to finish the well and guaranteed its success.

I cannot say that the evidence creates any strong impression on my mind that the defendant took the risk of finding water. I think it would have been very unreasonable on the part of the plaintiffs to expect him to do so when they were to pay a price which would have left him no profit, as the evidence shows, on the bare cost of the work. They were not paying him for the hazard. In fact, I read the evidence as pretty expressly negating any guarantee. The witnesses are the defendant himself, who point blank denies it; and Shortreed, the plaintiffs' manager, who does not say there was a guarantee, and who does say he did not ask for one. The whole of Shortreed's evidence is as follows: "Defendant spoke to me about the job. We wanted an artesian well to have a constant supply of water for the use of the works. I asked the defendant what he would put down an artesian well for for the gas works. He said 75 cents per foot. I wanted him to do it at once. I bid him go to Henderson's, and tell him to telegraph for the pipe. He said there was no use in doing that, as he had pipe of his own which he would put in for 31 cents a foot. I asked him how deep he would have to go. He said between 130 and 140 feet, he thought. I said I thought he would have to go considerably deeper. We spoke of the depth of wells in town, and Simpson's was mentioned. He said he did not think the difference in lay of ground at the gas works would be material. He agreed to go on with the well. He knew we wanted an overflow well for the use of the works to prevent gasometer from freezing. It was two or three weeks before he started. He did not work regularly. I think the cause of the stoppage in the thirty-seven feet bore was because the hole was made too small. When they got stuck in the second hole he said he would have to draw the pipe. I did not promise to pay for drawing it. It was drawn, when they had to stop finally. I did offer \$9 or \$10 to draw the pipe. We finally agreed he should have \$12 for drawing it. They got Lee at it to draw the pipe, but he got on a spree, and did not go on. I did not authorize any particular person to be

employed. I spoke to him afterwards about going on. He said he could not get Lee to draw it, and there was no other person who could do it here. I never heard of a claim for the work done until recently. The well is of no use to us."

Cross-examined:—"A new kind of pipe was spoken of. I said I would try and get it, but failed, and told Sullivan so. I expected to get an overflow. I was not certain about it. I judged from the number of wells that had been put down in Barrie that I would. I did not ask Sullivan to guarantee water."

I do not lose sight of the two-fold effect which the so-called guarantee might have, namely: as an undertaking that a flowing well should be established, which would render the guarantor liable in damages if it were not established; or as an agreement merely that the contractor should not be entitled to be paid unless he succeeded. The first aspect is out of the question. There is not a pretence for supposing that such a thing was ever thought of in this transaction. It is in the latter shape only that it can be contended for. It is a guarantee of that sort which is spoken of by the witnesses, and which, in my judgment, is by no means made out.

But the absence of such a guarantee is not decisive, because the defendant certainly did undertake to sink the well, and would have been bound to do whatever was reasonably covered by that undertaking; and the finding is, that he has, by his own voluntary act, quit the work before it was finished. He has left it in a state in which it is said to be of no value to the plaintiffs. I do not understand this to mean that all that has been done must go for nothing, but only that the plaintiffs, who want an artesian flowing well, have not yet got one. It is not stated that the work, if resumed by the defendant, or taken up by some one else, may not be proceeded with.

If the defendant has broken his bargain by refusing to continue the work the plaintiffs have their remedy against him. That question does not directly concern us at present.

In one respect the distinction between a contract to find water, and one to go as far as was reasonable in pursuit of it, is important, even though the latter contract is unfulfilled, because the less definite character of the latter makes it less likely that there should have been an understanding that nothing was to be paid while the work was in progress. The analogy does not exist between an agreement of that sort and one to supply an article of a particular kind, or which would serve a particular purpose.

The circumstances of this case seem to resemble so closely those of *Roberts v. Havelock*, 3 B. & A. 404, that I am unable to distinguish them in principle. The distinction drawn by the learned Judge in the Court below rests upon his finding that in this case there was a specific contract for completing the work for a specific price—that price to be measured when the work was done, by the number of feet; and by completing the work he understands the establishment of a flowing well.

In *Roberts v. Havelock* the plaintiff was employed and undertook to put a vessel *into thorough repair*. Before this was completed he refused to proceed further till paid for what he had done. The objection urged against his right to recover for the work actually done was like that now advanced, viz., that the plaintiff had not completed his contract, and that as long as that was the case the work already done was not available to the purpose for which it was required. Lord Tentenden said, at p. 406: "There is nothing in the present case amounting to a contract to do the whole repairs, and make no demand till they are completed. The plaintiff was entitled to say that he would proceed no further with the repairs till he was paid what was already due." Littledale, J., said: "The plaintiff undertook this work in the same way as shipwrights ordinarily do. It does not follow, from anything that passed, that he might not stop from time to time in the course of the work, and refuse to proceed till he was supplied with money." And Park, J., said: "If there had been any specific contract on the part of the

plaintiff for completing the work, the argument for the defendant might have had much weight. But this was only a general employment of the plaintiff by the defendant in the same way as all shipwrights are employed."

I do not see why all this does not apply to the case before us..

There is no doubt room for the observation that by enforcing payment at the agreed price per foot for the earlier part of the work, and then abandoning it, leaving the deeper boring, which may be more difficult or costly, unfinished, the contractor takes an unfair advantage. This, however, is one of the things to be provided for by express stipulation. It is perhaps sufficiently covered by the agreement to go on to the end, the proprietor relying on the responsibility of the contractor to finish the work, instead of the contractor relying on the responsibility of the proprietor for his pay when it is finished. But if not provided for in one way or the other it is the fault of the person who made the bargain. It is an oversight of the same kind as may have occurred in the arrangement which gave rise to the case of *Taylor v. Laird*, 1 H. & N. 266, in which the plaintiff, having been engaged to command a steamer which sailed from England in May, 1854, on an exploring and trading expedition up the river Niger and its tributaries, at £50 a month, from 1st December, 1853, and a commission upon the profits, abandoned the command of the vessel before the voyage was completed, and yet was held entitled to be paid for the time he had served. Some remarks made by Pollock, C.B., in giving judgment are not inapplicable, *mutatis mutandis*, to the case before us. He said, p. 274: "But further, if this meaning is not given the result would be, that had the plaintiff died, or the voyage failed at the last moment, nothing would be payable by the defendant, because, according to his contention, the performance of the entire work contracted for was a condition precedent to the right to receive anything. This cannot have been intended. It is said, on the other hand, that if the plaintiff's construction prevails he might stay in

England three or four months, then refuse to go on the voyage, and claim to be paid for the months elapsed, and the defendants have no remedy but in a cross-action. No doubt that would follow; but agreements should be construed as though made on the supposition that both parties would observe them, not break them; and on that supposition the plaintiff's construction is reasonable, and the defendant's is not."

I do not place so much stress as the learned Judge seems to have done on the circumstance that the defendant did not ask for payment as the work proceeded, as indicative of an understanding that he was not to be paid till it was finished, because it was undertaken in order to pay a debt which he owed the plaintiffs. He was in effect being paid as he went on by the satisfaction *pari passu* of his debt. The evidence of the plaintiffs' manager is, to my mind, far more suggestive, if inferences are to be drawn from the indirect evidence, of there being no such agreement as that now relied on by the plaintiffs. It was partly for the purpose of this reference to it that I extracted the manager's evidence in full, as it seemed very clearly to show that if the alleged contract existed it was certainly not insisted on when the manager agreed to pay for drawing the pipe when it stuck in the hole. Upon this point the evidence of McNair is stronger than that of Shortreed, which, indeed, in some particulars, it contradicts.

The learned Judge notes that he attached no weight to the evidence given of how contracts were made in Barrie in reference to well-sinking, there being nothing upon which to conclude that it was considered or was in the minds of the parties, or entered in any way into the contract made, and as the plaintiffs might have been, and probably were, wholly ignorant of what was done in Barrie in the few wells sunk there. He further stated that he could not infer that the parties had the usage in view; but inferred the contrary.

It is not necessary to decide precisely how far the evidence ought to have been considered, but, as it strikes me,

what was shewn respecting the agreements made in Barrie concerning such wells might not improperly have received some weight in the construction of the bargain. There may have been but few artesian wells sunk there. But Barrie is only a small place, and it may probably be a fact, and if so it was doubtless known to every one concerned in this case and to the learned Judge, that the wells have been sunk only within a few years. From one's ordinary acquaintance with the tendency of people to enquire about what they see going on, particularly if at all novel in its character, and from the knowledge derived from the evidence, that the attention of the plaintiffs by their managing officials had been directed to the subject of artesian wells, and artesian well-digging in Barrie, it would not be an extravagant inference for a jury to draw that Mr. Shortreed, when he agreed to 75 cents a foot, had not heard for the first time that that was a figure not unusual in Barrie, and had informed himself of what were the usual terms of the contracts taken at that price per foot. And as the evidence was offered, not to contradict anything expressly proved as one of the terms of the contract, but to aid in fixing the effect of what was neither reduced to writing nor otherwise shewn in any precise or definite terms, I am inclined to think there would have been no sound reason for its exclusion.

In *Robertson v. Jackson*, 2 M. & G. 412, which was decided in 1845, a question arose respecting the meaning of the words, "in turn to deliver," as contained in the charter party of a vessel carrying coals from London to the port at Algiers for the use of the French Government. The vessel had arrived at Algiers in March, 1842. Witnesses, asked respecting the meaning of these words amongst ship-owners and merchants engaged in the particular trade, spoke of the practice from the year 1836, and particularly from 1841. Upon its being objected that this practice was of too recent date, and too limited in its character to establish a course of dealing that would bind the plaintiff, a ship owner wholly unconnected with the particular trade, and

that there was no evidence to shew the particular form of charter under which the shipments spoken of had taken place, the defendants put in four charter parties applicable to the particular description of trade. The Lord Chief Justice told the jury that if they considered it proved to their satisfaction that there was a course of trade in London relative to the export of coals to Algiers for the use of the French Government, so universally well known amongst all persons conversant with the trade, that the plaintiff might be fairly presumed to have been cognizant of its particular regulations at the time he executed the charter party, they must find for the defendants. And, after a verdict had been found for the defendants, it was held that there could be no possible objection to that part of the charge.

In the case before us, if regard had been had to the usage spoken of by the witnesses, it would have materially strengthened the defendant's contention.

I should probably have found some difficulty in computing the amount earned by the defendant, as part of the work he did had to be abandoned, and another part done over again, but the learned Judge has made the computation, finding that the amount of work done by the defendant at the prices agreed, with the material, would be \$243.85.

It results from the view I take of the case that we should allow the defendant this amount, deducting from it \$103.95 due by him for calls and interest, and that a verdict should be entered for him on his plea of set-off for \$139.90.

MORRISON, J. A., concurred.

Appeal allowed.

NASMITH V. MANNING.

R. W. Co.—Action by creditor against shareholder—Proof of allotment.

The plaintiff, a creditor of a railway company, sued the defendant, as a shareholder therein, for unpaid stock. The defendant had signed the stock book, which was headed with an agreement by the subscribers to become stockholders for the amount set opposite their respective names, and upon allotment by the company "of my or our said respective shares," they covenanted to pay the company ten per cent. of the amount of said shares and all further calls. A resolution was subsequently passed by the company instructing their Secretary to issue allotment certificates to each shareholder for the shares held by him. The Secretary accordingly prepared such certificates, the one for the defendant representing that the company "in accordance with your application for 50 shares," &c., "have allotted you shares amounting to \$5000." These certificates were not sent to the shareholders, but were handed to the company's brokers for delivery to them. The brokers published a notice in a daily paper that these certificates were lying at their office, but did not send written notices to the subscribers. The defendant never called for or received his certificate of allotment and never paid the ten per cent. He swore that he signed upon a verbal agreement with one L., a promoter and a provisional director of the company, that he and another should receive the contract for building the road, which was never awarded to them; and that he never had any notice of the allotment having been made to him. The learned Judge at the trial was unable to say whether the defendant received actual notice of allotment, but found that the company sent notices to him of calls; and that his name was published as a shareholder in a newspaper to which he was a subscriber. The only evidence of the notices being sent to the defendant was the general statement of the Secretary that he directed notices to be sent ten months after the allotment, to those shareholders likely to pay, that their calls were due. *Held*, reversing the judgment of the Queen's Bench, Moss, C.J.A., dissenting, that the defendant was not liable, as the evidence, more fully set out below, was not sufficient to prove notice of allotment to him. *Held*, also, that if he had received notice of allotment, the fact that the contract was not awarded, as promised, would have formed no defence, as L. had no power to bind the company by annexing such an agreement to his subscription. *Per* BURTON, J.A., that even if a notice of calls were sufficient to prove notice of allotment, the defendant would not have been bound by such a notice received ten months after his subscription.

Appeal from the Queen's Bench.

Sci. Fa. on a judgment against the Toronto, Grey, and Bruce Railway Company, for the sum of \$5,582.74 damages, and \$20.71 costs, alleging that the defendant was the holder of fifty shares of the capital stock of that company, and that \$5,000 remained unpaid in respect thereof.

The defendant appeared and pleaded the pleas set out in the report of this case in 29 C. P. 34, upon which pleas issue was joined.

The cause was tried before Armour, J., without a jury, at the Spring Assizes at Toronto, in 1878, when the learned Judge found a verdict for the plaintiff and \$4,843.40 damages, finding specially that the defendant became a shareholder in fact and in law: that there was no such agreement proved either in fact or in law as operated as a condition precedent to the defendant being a shareholder: that Laidlaw had no authority in fact to make any such agreement as was propounded by the defendant; and that the plaintiff was entitled to recover on all the issues.

Upon application to the Court of Common Pleas, to which Court this suit had been transferred under 41 Vic, ch. 8, sec. 4, sub-sec. 14 a, O., to enter a verdict for the defendant, that Court directed a new trial, for the purpose of finding whether the defendant was notified or made aware that the company had accepted him as a stockholder according to his subscription.

This cause was thereupon tried at the last Winter Assizes at Toronto, before Cameron, J., without a jury, who allowed the fifth and sixth pleas to be amended by alleging that the agreement was to give the defendant and one John Ginty the contract therein referred to.

From the evidence, which is to the same effect as set out in the report of the case in 29 C. P. 34, it appeared in substance that the defendant signed the stock-book, which was headed with an agreement by the subscribers to become shareholders of the stock for the amount set opposite their respective names, and upon allotment by the company "of my or our said respective shares," they covenanted to pay the Company ten per cent. of the amount of the said shares and all future calls. The Company subsequently, on the 1st of July, passed a resolution instructing their Secretary "to issue allotment certificates to each shareholder for the shares held by him." The Secretary accordingly prepared such certificates, the one for the defendant representing that the Company "in accordance with your application for fifty shares," &c., "have allotted to you shares amounting to \$5000." The certificates were handed to the

Company's brokers to deliver to the shareholders. The Company published a notice in a daily paper that these certificates were lying at their brokers, who were authorized to receive the ten per cent. The defendant never called for or received his certificate of allotment, and never paid the ten per cent. The defendant stated that he never had any notice of the allotment being made to him.

The defendant also stated that he signed the stock list on the faith of a parol agreement made with one George Laidlaw, a promoter and a provisional director of the Company, that he and one John Ginty should receive the contract for building the road, which was never awarded to them.

The learned Judge found a verdict for the plaintiff and \$4,750 damages, finding specially :

1. That the defendant subscribed for fifty shares in the stock list of the company.

2. That the company allotted him fifty shares.

3. That the company sent notice to him of calls, and that his name was published in the *Globe* newspaper as a shareholder, and that at the time of such publication he was a subscriber to the *Globe*.

4. That all was done by the company to give the defendant a claim against the company for the stock, and to have any benefits that might accrue therefrom.

5. That he could not say that the defendant received actual notice of the allotment, but he found that the company, by notices sent to his address, gave him notice of their considering him a shareholder.

In Michaelmas Term, 1879, a rule *nisi* to set aside the verdict for the plaintiff and to enter it for the defendant was discharged (a). From this decision the defendant appealed.

(a) The judgments delivered in the Court below, which have not been reported, were as follows :

HAGARTY, C. J.—The general principles governing cases like the present have been frequently discussed in our Courts, and it is not necessary again to notice them.

After the first trial, this case, with that of *Newman v. Ginty*, 29 C. P.

The case was argued on the 12th of September, 1879 (*a*). *Ferguson*, Q. C., for the appellant. The plaintiff failed to prove that the defendant was a shareholder. Not only

34, was argued in the Common Pleas, and was sent down for another trial. The general principle was settled that, after proof of defendant's subscription, there should, in the language of Mr. Justice Gwynne, 29 C. P., p. 52, "be shown to have been some response, either in writing or verbally, or by conduct, communicating to the defendant that the company had accepted his application and himself as a shareholder."

My own language there was, p. 53, "I concur in thinking that our best course is, to direct a new trial, so as to have it expressly found as a fact whether the defendant was notified or received notice in any shape, or was made aware of the company having accepted him as a stockholder, according to his subscription—notice in substance that the directors, or the company, assented to or accepted him as the holder of the subscribed shares."

The learned Judge found—1. That defendant subscribed for fifty shares. 2. That fifty shares were allotted to him by the company. 3. That the company sent notice to him of calls; that his name was published in the *Globe* newspaper, to which he was then a subscriber. 4. That all was done by the company to give defendant a claim against the company for the stock, and to have any benefit that might accrue therefrom. 5. I cannot say that defendant received actual notice of the allotment, but I find that the company, by notices sent to his address, gave him notice of their considering him a shareholder.

The subscription was made in May or June, 1869. Defendant was a very active advocate of the railway, and had attended meetings in the country to advocate its claims to municipal aid. It was well known to him, and to everybody, that the amount required for its construction could never be obtained from individual subscribers of stock, and that the main hope of the promoters lay in the large subscriptions expected from the municipalities. It was necessary to obtain a subscription of \$300,000 to start the company. There was no idea that any person subscribing or applying for shares would not, as has often occurred in English railway promotion, have at once the ready assent of the directors to allot to them the full amount subscribed for. Defendant was desirous of obtaining a contract for the construction of the road, and he says it was solely with the expectation of getting such contract that he subscribed. Mr. Ginty, with whom, as his co-partner, he afterwards tendered for the work, also subscribed and paid the 10 per cent. call. Defendant deposed that it was verbally agreed that if he and Ginty did not get the contract they were not to be considered stockholders; that he tried all he could to get the contract, and spoke to several of the directors about it. He says: "I told the directors what the arrangement was, and it was fully understood. I felt sure I would get the contract. If I had got the contract I should have paid my calls out of the estimates." He also said that if he got the contract he was prepared to pay for the stock, and that Mr. Laidlaw told him that the bonuses were so large that the stock would be almost free. Tenders were sent in by the defendant and Ginty on the 15th of October, and again on the 6th of November, several months after the subscriptions. He was asked why did he sign the subscription before he got the contract. He answers, "Because they wanted to get up the

(*a*) *Present*.—MOSS, C. J. A., BURTON, PATTERSON, and MORRISON, JJ. A.

did the evidence not shew that he was such shareholder, but, on the contrary, it showed he was not a shareholder. The true construction of the document signed by the defendant is, that it was an application for shares; and in order to make the defendant liable as a shareholder it was necessary to show that there had been an answer to this

list to see how much they would get." Mr. Laidlaw had previously stated that the object in publishing the list of subscribers (which appeared in the *Globe*, in October,) was, to induce municipal subscriptions in the country. It may be quite true that defendant has no recollection whatever of receiving any letters or notices from the company as to allotment of stock or to pay calls, but it may be equally true that all such notices as those spoken of were duly sent by the company to defendant's proper address in Toronto. The learned Judge has found that they were sent. I do not see how it is possible to say that a verdict for the plaintiff on the evidence at the last trial is incorrect, or that the proper finding of any intelligent jury on such evidence must not have been that, under all the circumstances, enough has been done for the defendant to understand and have legal knowledge imputed to him that the shares subscribed for had been allotted to him, and that he was accepted by the company as a shareholder therein to that amount. I therefore think that the purpose for which this case was sent down for a new trial has been answered, and that the verdict must stand.

ARMOUR, J.—The contention of the defendant, as I understand it, is, that although he signed the stock book set out in 29 C. P. 36, yet that he never became a shareholder of the company, because no allotment of shares was ever made to him, and if an allotment was made he never had any notice of it, nor had he ever any notice of any calls being made upon him; nor did he ever know that the company had treated him as a shareholder until about two years before the trial of this action.

A somewhat similar contention was raised in the somewhat similar case of *Denison v. Lesslie*, reported in 43 U. C. R. 22, and in 3 App. R. 536.

In that case Moss, C.J.A., who delivered the judgment of the Court of Appeal, says, p. 545, "During the argument I felt some doubt whether anything more was necessary to complete the liability of the defendant than the mere fact of recording him as the holder of, and thus allotting to him his shares. Further consideration, however, has satisfied me that the Court below was quite right in holding that the additional fact of communication in some manner to the defendant was essential. * * The learned Judge, by whom the case was tried without a jury, did not make any specific findings, and we do not know whether his attention was expressly directed to, or whether he formed any opinion upon the point which now seems to be deemed the cardinal one in the case, namely, whether upon the evidence it should be held that the defendant knew that the company had accepted his application for ten shares. As is pointed out in the judgment of the Court, a formal notice need not be shewn; it is only necessary that there should be evidence, whether of conduct or otherwise, sufficient to satisfy the judicial mind that the knowledge of an acceptance of his offer had reached the applicant. This makes it especially regret-

application received by or communicated to the defendant, stating, or at least to the effect, that the company had accepted his application, and himself as a shareholder. The burden of showing this was clearly upon the plaintiff, but in this respect his evidence failed, and there was more-over a positive denial by the defendant. It is also a very significant fact, that a long series of years passed away after the date of the application, during which time neither the company nor the defendant considered the defendant a shareholder. *Denison v. Lesslie*, 43 U.C. R. 22; *Reidpath's Case*, L. R. 11 Eq. 86; *Wall's Case*, L. R. 15 Eq. 18; *Pellatt's Case*, L. R. 2 Ch. 527; *Gunn's Case*, L. R. 3 Ch. 40-45; *British and American Telegraph Co. v. Colson*, L. R. 6 Ex. 108; *Kipling v. Todd*, L. R. 3 C.P.D. 350; *Townsend's Case*, L. R. 13 Eq. 148, are distinguishable. The verdict entered was not warranted by the findings of the learned Judge, before whom the cause was tried, and it should have been set aside by the Court below and a nonsuit or a verdict for the defendant entered. Nor were the findings supported by the evidence, and it is competent for this Court now to reverse these findings, or some of them, as they are founded, at least in part, upon inferences of fact drawn by the learned Judge: *Re Glannibanta*, L. R. 1 P. D. 283; *In re Randolph*, 1 App. R. 315.

table that the opinion of the learned Judge was not obtained, for I think that it would have been practically conclusive. At least, speaking for myself, I should never have ventured to question its correctness upon this evidence."

I have carefully perused the evidence in the case before us, and I think that it amply supports the findings of the learned Judge.

I think also, that the true conclusion to be drawn from the evidence, and the conclusion which I, as a judge of fact, now draw, is that the defendant received actual notice of the allotment, and I think the learned Judge ought to have so found.

There is, in my opinion, abundant evidence, both of conduct and otherwise, quite sufficient to satisfy the judicial mind that the knowledge of the acceptance by the company of the defendant as a shareholder, in respect of the shares subscribed for by him, reached the defendant.

I am of opinion, therefore, that the verdict should stand, and the rule be discharged.

CAMERON, J., concurred.

Rule discharged.

H. MacMahon, Q. C., and *Proctor*, for the respondent. The findings of the learned Judge at the trial as to the facts were fully warranted by the evidence, and as they have been approved of by the Court below, they should not be reversed. The statute 31 Vic. ch. 40, O., incorporating the Toronto, Grey, and Bruce Railway, expressly incorporates the clauses in the Railway Act, C. S. C., ch. 66, relating to calls, shares and their transfer, and sub-sec. 19, sec. 7, defines a shareholder as being "every subscriber to and holder of stock in the undertaking." The evidence discloses the fact that the company placed the appellant on their stock-book, did in fact allot him the stock; sent notice thereof to his address, published him as such a shareholder in the paper to which he was a subscriber, and sent him notices of calls. Under these circumstances it is idle to contend that he is not a shareholder. Moreover, it appears that he urged upon the directors his right to claim the contract for building the company's railway, which he alleged was agreed to be given to him and one John Ginty as an inducement to them to become shareholders in the company; and he ought not now to be heard to say that he is not a shareholder after having urged it as a reason for getting the contract: *Lake Superior Navigation Company v. Morrison*, 22 C. P. 217; *Davidson v. Grange*, 4 Gr. 380; *Wilson v. Ginty*, 3 App. R. 124; *Elkington's Case*, L. R. 2 Ch. 511; *Denison v. Lesslie*, 3 App. R. 536; *Rankin v. Hop and Malt Company*, 20 L. T. N. S. 207. The document signed by the appellant being covenant to pay under seal, the assent of the company thereto is sufficient, and such assent must be inferred if, as shown in this case, the document was not repudiated by the company; but the evidence shews that the company did actually assent to the subscription, and by their secretary sent him notices to pay up calls on the stock. The delay by the directors in collecting cannot have the effect of relieving the appellant: *Adams's Case*, L. R. 13 Eq. 474; *Bloxam's Case*, 33 Beav. 529. If notice of allotment were necessary, such notice may be implied

from the facts of the case, and sufficient is disclosed by the evidence to show that the appellant was aware of the company's acceptance of his subscription, or was in a position to have known it, and is therefore liable : *Levita's Case*, L. R. 3 Ch. 36 ; *Wheatcroft's Case*, 29 L. T. N. S. 324 ; *Pritchard v. Walker*, 24 C. P. 434 ; *Gunn's Case*, L. R. 3 Ch. 40 ; *Fletcher's Case*, 17 L. T. N. S. 136 ; *Crawley's Case*, L. R. 4 Ch. 322. Having become a shareholder, no action of the company can operate so as to relieve him from liability to creditors ; and as the appellant took no action to have his name removed from the stock list before the rights of creditors intervened he cannot now escape from liability : *Roger's Case* and *Harrison's Case*, L. R. 3 Ch. 638 ; *Bullivant v. Manning*, 41 U. C. R. 17 ; *Denison v. Lesslie*, 3 App. R. 533 ; *Ookes v. Turquand*, L. R. 2 H. L. 325 ; *Moore v. Murphy*, 11 C. P. 444 ; *Moore v. Hudson*, 11 C. P. 454, 455. The notices sent by the secretary of the company notifying him of the calls and asking for payment were sufficient notice, if notice in this case were necessary, to constitute the appellant a shareholder : *Wall's Case*, L. R. 15 Eq. 18, 21 ; *Harris's Case*, L. R. 7 Chy. 587 ; *Dunlop v. Higgins*, 1 H. L. C. 381 ; *Harrison's Case*, L. R. 7 Ch. 590.

March 2, 1880. BURTON, J. A.—This is one of the numerous actions which have been prosecuted against persons alleged to be shareholders in the Toronto, Grey, and Bruce Railway Co. It differs in several respects from the case of *Wilson v. Ginty*, 3 App. R. 124, decided in this Court, where it was sufficient to hold that the defendant accepted the certificate of allotment, and paid the cash instalment required at the time of allotment, in order to constitute him a shareholder and render him liable to creditors in this form of proceeding.

In the present case no such payment was made, and the defendant denies all knowledge of an allotment having been made, if that under the circumstances was necessary ; but the substantial answer, which he relied

upon previously to being sued, was evidently that he regarded the application for shares to have been conditional on his receiving the contract for construction of the road: that his offer to take shares was in his view made on these terms, and that an allotment to him simpliciter, even if made, was no acceptance of his qualified offer, and that there never was therefore any concluded agreement for him to become a shareholder.

Mr. Laidlaw, the provisional director who obtained the signature of the defendant to the stock book, had no authority, I assume, to accept subscriptions in that way, and it is not clear that the terms on which the subscription was made were brought under the notice of the board which dealt with the allotments; it may be that it would not be within their powers to allot shares on such terms, although I do not at present see that there would be any thing illegal in such an arrangement; but, be that as it may, the facts appear to be that they treated this as an ordinary application for shares, and that they allotted them in the same manner as they dealt with all other shares.

For this, and other reasons referred to in the judgment in *Wilson v. Ginty*, 3 App. R. 124, I am of opinion that this contention of the defendant was not tenable, but it is important to bear in mind the position that the defendant occupied, or fancied that he occupied, in reference to this company, in weighing the testimony by which it is sought to fix him with knowledge of the allotment.

The question at the trial was confined to the issue raised on the first plea, viz., whether the defendant was or was not a shareholder.

The case was twice tried. On the first occasion the Common Pleas directed a new trial, in order that it might be expressly found as a fact, whether the defendant was notified or was made aware of the Company having accepted him as a stockholder according to his subscription.

The learned Judge at the last trial, Mr. Justice Cameron, found 1. That the defendant subscribed for the fifty shares, as shewn by Exhibit 1. 2. That fifty shares were allotted

to him by the company. 3. That the company sent notice to him of calls, and that his name was published in the *Globe* newspaper as a shareholder, and that he was at the time of such publication a subscriber to the *Globe*. 4. That all was done by the company to give the defendant a claim against the company for the stock, and to have any benefits that might accrue therefrom. 5. That he was unable to say that defendant received actual notice of the allotment, but he found that the company, by notices sent to his address, gave him notice of their considering him a shareholder. And a verdict was entered for plaintiff for \$4,470.

All that remains for us to do is, to consider whether there is evidence to sustain these findings; and whether, on the assumption that they are correct, this defendant is shewn to be a shareholder.

It is to be borne in mind that this remedy is not a common law right, but is an extraordinary one given by statute, and that the requisites of the statute must, in all matters, be strictly made out. We are not at liberty, as was said in *Neff v. Angas*, 3 Ex. 812, to create an equity, as it were, arising out of the statute, and to say that every person who might be sued in consequence of representations or conduct tending to shew that he was a shareholder, and which as against him would be evidence that he was such, can be considered as a member for the purpose of proceeding by *scire facias*; and many of the cases, therefore, which were cited as bearing on the liability of contributories on a winding up have little or no application.

It was urged that the cases decided in England, where the usual course of proceeding is for parties to make application for shares, proceeded altogether upon different considerations, and that the subscribers here became liable at once on subscribing the books presented to them by the company. I do not for a moment question that the heading of the stock books might have been so framed as to render any formal allotment unnecessary, and to have fixed the subscribers with a liability at once upon signing. But

that is not the case here, and the fact that the document was under seal cannot affect the question. It was open to the directors to refuse to allot any shares to the defendant, and however improbable we may know that to have been, it cannot affect the construction of the instrument.

I entertain no doubt that the subscribers to this agreement could at any time before actual allotment have cancelled their subscription. The promoters were probably under an apprehension that if the subscription had been left as an unconditional one, parties unfriendly to the project might have subscribed to a sufficient amount to give them the control of the undertaking, and thus prevent its being carried out, and for this reason they reserved to the directors the power to allot the stock as they thought proper; but they could not do this without affording to the subscribers an equal right to withdraw before allotment.

Bloxam's Case, 33 Beav. 529, which has sometimes been referred to as an authority that an applicant may become bound as a shareholder without having received notice of allotment, has again been cited in support of that proposition. Lord Justice Knight Bruce expressed himself as not quite satisfied with the decision, and the case has always been distinguished as turning upon special circumstances. And numerous more recent cases are to be found, deciding that to make a man a shareholder there must be an appropriation of specific shares to him, and notice to him of it. See *Sahlgreen and Carrall's Case*, L. R. 3 Ch. 323; *Pellatt's Case*, L. R. 2 Ch. 527; *Wallis's Case*, L. R. 4 Ch. 325; *Robinson's Case*, L. R. 4 Ch. 330.

The learned Judge, who presided at the last trial, whilst finding that the directors allotted to the defendant fifty shares of stock, has not found, and the evidence would not have warranted him in finding, that any letter or notice of allotment was sent to him. The fair inference, and in fact the only inference, to be fairly drawn from the evidence is that no such notice was sent. The letters of allotment were in fact sent to Messrs. Campbell & Cassells, as brokers for the company, who inserted a notice in the newspapers,

requesting the subscribers to call at their office, but did not send written notices to the subscribers; and although they sent a clerk round to several, there is no evidence that Mr. Manning was seen by him, and it is in evidence that about that period he was absent from the city.

But it is of course immaterial how he received notice if he did in fact receive it within a reasonable time after the allotment. The learned Judge has nowhere found that he did receive notice. All that he has found is, that the company sent notice to him of calls, and that his name was published in the *Globe* newspaper, and that he was at the time of such publication a subscriber to the *Globe*.

I confess that I should not have drawn the same inference as the learned Judge, that the company sent notice to him of calls.

If the General Railway Act or the Special Act had provided that notice of calls should be given to shareholders by letter to each shareholder, in addition to the advertisement, there would be room for the assumption that its requirements had been complied with; or if it had been shewn that by the usual course of business such notice had been given whenever a call was made, a presumption might have arisen that such notice was sent to each of the parties to whom stock had been allotted. But not only is there no evidence of any such usage, but from the plaintiff's own evidence the contrary appears to be the fact. The exhibit No. 6 is not a notice of a call, but a letter reminding the shareholders that the call was due and urging payment, and squares with Mr. Taylor's evidence: "I think I sent circulars of that kind more than once; they were sent when we were wanting money badly." This gentleman admits that he became aware in the early days of the company that Mr. Manning objected to pay his stock.

The inference I draw from the evidence is, that notices of calls were not given: that such notices as were given were notices urging the shareholders to meet overdue calls, and that for obvious reasons no such notices were sent to Mr. Manning, from whom a favourable response could

scarcely be anticipated. But assuming the learned Judge's finding to be correct, a notice so sent is not, under the circumstances, of any avail unless received. Without expressing any opinion as to the general effect of the acceptance of an offer by letter duly posted, the principle established by *Dunlop v. Higgins*, 1 H. L. C. 381, has no application to the present case. In reviewing that decision in *Household Fire, &c., Ins. Co. v. Grant*, 41 L. T. N. S. 298, Baggallay, L. J., says, at p. 302: "I think the principle established by that case is limited in its application to cases in which by general usage or of the relation between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorized."

If the learned Judge had found as a fact that notice of allotment had been sent by post to the defendant, then I think we must have held, in deference to the authorities, that there was a completed contract between the parties; but the bald finding that a notice of a call was posted to the defendant can have no more effect in fixing him with notice of allotment than we could hold a notice to quit served by proving that it was posted to the defendant so as to reach him in due time, if delivered in proper course.

I notice that when a nonsuit was moved for at the trial, the learned Judge did not apparently attach much importance to these letters, as he is reported to have said:

"The only evidence affecting Manning at all is the fact of the publication in the newspapers, his name appearing in the list."

Now, I must admit that I attach no importance to this publication. I go so far indeed as to doubt whether its reception was strictly admissible as evidence at all. I have already remarked, that in an action of this nature a defendant cannot be made liable by conduct. The evidence is only receivable, if at all, as notice to Manning that this stock had been allotted to him; but it conveyed no such notice, it was a mere exhibition by the promoters to the

eyes of the ratepayers, whose votes they were soliciting, of the persons who had subscribed. If there had been among these subscribers some few whom the directors had decided to exclude from the allotment, can any sane man doubt that these names would, notwithstanding, have appeared in these placards?

They did not profess to be issued by the company as a list of persons to whom stock had been allotted. If they had met the defendant's eye they would have afforded him no such information, and he swears he never saw them, and never received any notice of any kind.

I entirely concur with the view apparently taken by the learned Judge at the trial, that there was no evidence to warrant the conclusion that these letters were sent to the defendant.

In *Hetherington v. Kemp*, 4 Camp. 193, it was held not sufficient *prima facie* evidence of a letter being sent by the post, that it was written by a merchant in his counting house, and put upon a table for the purpose of being carried to the post office, and that by the course of business in the counting house all letters deposited on the table were carried to the post office by a porter; it being held that some evidence should have been given that the letter was taken from the table and put into the post office. Had the porter been called, and said that, although he had no recollection of the letter in question, he invariably carried to the post office all the letters found upon the table, it might have done.

So the entry of a deceased clerk in a letter book was received in evidence, on proving that it was made in the usual course of business: *Hagedorn v. Reid*, 3 Camp. 379.

Here the secretary says, that he is unable to say whether one of the circulars was sent to Mr. Manning: "that he did not send them himself: that he thinks he sent circulars of the kind more than once. They were sent when we were wanting money badly. It was the business of one of the clerks to send them." He does, it is true, state that the circulars should have been sent to all; but he qualifies

this general remark in cross-examination, saying, when we wanted money we sent to stockholders that it was thought would pay. And, also, that he heard in the early days of the company that Mr. Manning objected to pay his stock; and that he, the secretary, had a general impression that it was no use asking him for money.

The fourth finding is nothing more than that stock was allotted, so that the defendant, if made aware of it, might have insisted on being recognized as a stockholder; and as to the fifth, I have already shewn that there was, in my judgment, no evidence proper to submit to a jury to warrant the finding.

I do not doubt, as the learned Chief Justice of the Queen's Bench has suggested, that if the evidence in this case had been submitted to a jury they would have found against the defendant; but the doubt I do feel is, whether there was any evidence which ought reasonably to have satisfied a jury that the fact sought to be proved, viz., that notice was brought home to the defendant, was established; or any evidence, in other words, which a Judge ought to have submitted to them. The jury would have given a general verdict, and if there was evidence proper to submit to them that would have been final; we should unquestionably not have interfered with it. Still less should we be disposed to interfere with the finding of the Judge if, upon the same assumption, he had found, as a fact, that the defendant had notice; although a question would still have remained open for our consideration, viz., whether receiving that notice so many months after the original allotment would be binding upon him; as to which see *Ramsgate Hotel Co. v. Montfrevre*, 4 H. & C. 164. If he was once fixed in due time with notice of the allotment, I agree with the respondent's contention that the mere delay of the directors in enforcing the payment cannot prejudice the present plaintiff. I should, however, if necessary, hold that the defendant would not be bound by an allotment of which, according to the most favourable view of the plaintiff's evidence, he received no notice until after the lapse of nearly ten months.

I do not, for the reasons I have mentioned, consider the special findings of the Judge sufficient to fix the defendant with liability as a member of the company, and in considering the evidence as a juror I am compelled to arrive at a different conclusion from that arrived at by the Court of Queen's Bench; and I will proceed briefly to summarize my reasons.

It is shown on the part of the plaintiffs that no notice of allotment was given to the defendant, and in this respect the plaintiff's evidence and the statement of the defendant agree.

It is clear that the notices of calls were not made, and the dunning circulars which were sent were not shewn to have been posted in due course to all shareholders, or in fact to have been posted at all. There is some vague evidence of their being sent—how or when, or by whom, not appearing—to those likely to pay, and it is in evidence that Mr. Manning was not likely to pay. I think the fair inference from the evidence, if it is to be regarded as legal evidence, is, that no such notice was sent to him, and I prefer his positive statement to the vague and unsatisfactory evidence by which it is sought to fix him with notice.

It is urged, however, that notice in his case was unnecessary, inasmuch as he signed in expectation of getting the contract; but I do not understand how that consideration affects the question. If there had been an agreement that he should get the contract, and as part of that arrangement he should take shares, I can quite understand how this giving him the contract in connection with his subscription would constitute him a shareholder or member of the company without receiving any notice of allotment; but although the defendant might, from not specifying the conditions on which he subscribed in his application, have exposed himself to the risk of being held liable upon a mere acceptance of it in its terms, it must not be overlooked that he considered the verbal arrangement good, that if he did not get the contract he was not to be considered a shareholder, and failing to receive either the contract or notice,

he might not unreasonably assume that good faith was being kept with him and rest satisfied that he was not regarded as a shareholder. We have nothing to do with the morality of allowing his name to be hawked about the country as a subscriber, in order to delude the ratepayers whom that list was intended to influence. He was no party to that, and even if he had been, he cannot be made liable upon such grounds.

It appears to me that the evidence of the defendant is strongly corroborated by the facts disclosed in the plaintiff's case, viz., that the board were early apprised that he repudiated all liability as a shareholder, and that the fair and almost irresistible inference is therefore that they did not send notices to him, apart from the positive denial of the defendant himself.

The earliest notice that the directors sent to any one apparently was 18th May, 1870, some ten months after the allotment, so that it is questionable whether such a notice could, if received, have been held to be within a reasonable time; but if I am to find as a fact what the learned Judge has omitted to find, I cannot reject the defendant's testimony denying in the most positive terms any notice whatever, borne out as that testimony is by facts shown by the plaintiff himself.

If the evidence had shewn that notices were at the time of each call invariably sent to every shareholder without distinction, it would be impossible to believe the defendant's evidence as opposed to that cumulative proof of ten separate applications; but when we find that that was not the practice, but that occasional notices were sent to those likely to pay, which the secretary well knew this defendant was not, I am not disposed to set aside his evidence. Such a course, I venture to think, is, having reference to the burden of proof, contrary to the principles on which Courts are in the habit of receiving and weighing testimony.

I come therefore to the conclusion that the plaintiff has failed to establish the fact, which it was incumbent upon

him to shew, that at the time of the issuing of the *sci. fa.* herein the defendant was a member of the company. I think therefore this appeal should be allowed.

PATTERSON, J. A.—Before the defendant could become a shareholder under the contract which he signed, it was necessary that shares should be allotted to him by the company, and that that allotment should be communicated to him. By the terms of the contract, the subscriber agreed, upon the allotment by the company of his shares, to pay ten per cent., and to pay future calls.

The act of the company by which the allotment was made seems to have been a resolution, adopted at a meeting of the Provisional Directors on 1st July, 1869. The minute, which is in evidence, informs us that the president stated that on the previous evening the amount of stock required by the charter for organizing the company, viz., \$300,000, had all been subscribed, and that therefore it was necessary at once to devise means to collect and pay into the bank the first instalment of ten per cent. on the shares, so that the meeting for the election of directors and organizing the company could be called at as early a date as possible. The brokers, Messrs. Campbell & Cassels, were instructed at once to collect the first instalment of ten per cent. on the stock, and to have the amount required by law, viz., \$30,000, paid into the bank; the secretary received instructions concerning the calling of a general meeting of shareholders; “the secretary was also instructed to issue allotment certificates to each shareholder for the amount of shares held by him.”

It appears from this extract that all the shares subscribed for were allotted to the subscribers. So far one of the requisites of the defendant's liability existed. The directors had apparently also provided for the performance of the other requisite by directing the secretary to issue allotment certificates to the subscribers; but it is quite clear that the secretary did not do that, or any thing in its place, in such a way as to give notice of the allotment to this defendant.

What he did was to prepare the certificates and hand them to the brokers, to be delivered to subscribers only after they paid the ten per cent., a receipt for which was indorsed upon the certificate.

This form of certificate, if communicated to a subscriber, was calculated to lead him to suppose that the allotment, was conditional upon his paying the ten per cent., and that, by declining to pay he was discharged from his agreement to take the shares. It is not improbable that the defendant in *Denison v. Lesslie*, 3 App. R. 536, was misled in this way; but we felt ourselves obliged to hold that his knowledge of the allotment fixed him with liability—that knowledge having been found as a fact upon evidence sufficient to support that finding.

There is no evidence of any communication to the present defendant of the fact that the certificate was ready for him. It seems to have remained for a time in the office of the brokers, and to have been then returned to the secretary, by whom it was produced at the trial. No notice of it was sent to the defendant, and no demand of payment or other reference to him on the subject is shewn ever to have been made by the brokers, or by the secretary, or by any one representing the company. The fact is put beyond all question by the evidence that no formal notice of allotment was ever given to the defendant. If notice is brought home to him it can only be notice of an indirect and informal character. The effect claimed for the evidence is better expressed by saying that it is contended rather that the defendant knew of the allotment, than that notice of it was given to him.

It is shewn that the defendant was induced to subscribe for stock by Mr. Laidlaw, who was one of the provisional directors and who was taking a very active part as a promoter of the company, and that there was an understanding between them that the defendant was only to be a shareholder in case he was awarded a contract for the construction of the road. We have already had occasion to point out, when these facts were before us in *Wilson v.*

Ginty, 3 App. R. 124, that Mr. Laidlaw cannot be said to have committed the company to any bargain, and that the understanding with him about the contract had not the effect of making the subscription conditional upon the contract being awarded. It is necessary, in this case also, to guard against confounding the sayings or doings of Mr. Laidlaw with the acts of the company.

The defendant had been to some extent active in advocating the claims of this railway in the municipalities which were looked to for assistance in the way of bonuses. He had subscribed for a considerable amount of stock. He was a contractor for works such as the construction of railways; and he had bargained with Mr. Laidlaw for a contract on this road. It is, therefore, not difficult to imagine that he felt sufficient interest in this particular enterprise to have kept himself informed of what went on, and that he very likely knew of the proceedings of the directors on 1st July, 1869, and of the steps they proposed to take for calling in the ten per cent. We are not, however, at liberty to act on what may strike us as probable, without some substantive evidence. As it happens, we have the defendant's evidence that in June and July, 1869, he was in New York, a circumstance which weakens even the probability of his having known of what was done in the latter month.

I have read the evidence with great care, and I am obliged to confess myself unable to lay my finger on any that strikes me as proper to submit to a jury as evidence of notice or knowledge of the allotment.

I find from the reporter's note that when at the close of the plaintiff's case the counsel for the defendant moved for a nonsuit, the learned Judge remarked that the only evidence affecting the defendant at all, was the fact of the publication in the newspaper, his name appearing in the list. I had myself, on reading the evidence, been struck with what seemed to be the force of that circumstance. I gather that one device of Mr. Laidlaw for influencing the ratepayers of the municipalities where he sought bonuses

was to publish a list of the subscribers, and, to use the defendant's own language in his evidence given in another suit, "he wanted to raise a large amount of stock here, so as to shew to the people outside who were giving bonuses that the people here were contributing largely to the undertaking."

The defendant's name was accordingly published along with the others, and I assume it was so used with his assent, and that he knew it was so used, and was content that it should be so used to lead people to suppose that he was a stockholder to the amount mentioned. This certainly struck me as strong evidence against him; but when I came to reduce it to its legitimate force as bearing on the issue we are trying, it lost much of its significance. He says in his evidence that he thought *the amount* he subscribed was to go into the country, but not his name. I do not think the distinction makes any difference. This plaintiff does not urge any estoppel against the defendant upon the ground of having been led to give credit to the company on the strength of the name of the defendant. The assent to the statement of the amount of his subscription would be, as I look at it, evidence of just the same character as the assent to the publication of his name. If, as he says, he understood the bonuses would be asked for on the faith of the general subscription, he was guilty of as bad faith in letting his subscription appear as part of the general amount which the public were to be asked to take as the *bonâ fide* contribution to the undertaking, as if his name had accompanied the statement.

As far as I can gather from the evidence, however, this assent was before the allotment had been made. It was in fact connected with the consent to subscribe. Mr. Laidlaw wished to show a large subscription list, and the defendant consented to subscribe partly to swell the list. Whatever force might be given to this conduct as a waiver of any notice of allotment, it clearly did not admit notice before the allotment was made. We have no details of how, where, or when Mr. Laidlaw used this list.

Unless I have overlooked something in the evidence, I believe the only publication shewn was in October, 1869, in connection with the account of the turning of the first sod, a celebration with which the defendant had expressly refused to connect himself, and a time long after he had ceased to work in harmony with Mr. Laidlaw, or to profess any interest in the company. It is not shewn that he knew of this publication, even if that would have been of any consequence; neither does it appear how or by whom the publication happened to be made at that time, further than that the secretary thinks the list was prepared by him or under his direction.

Then there is the fact which must not be lost sight of, that whatever the defendant did or agreed to was in connection with Mr. Laidlaw, the distinction between whom and the company we have acted on in a former case.

Upon the whole I cannot satisfy myself that we should be justified by sound principles in treating anything told us respecting the list of names, as evidence that the defendant knew of the allotment to him.

I think the presumption, from all we hear, is the other way. It may be true, as we have held, that Mr. Laidlaw's stipulation about the contract did not bind the company, or give a conditional character to the legal operation of the defendant's subscription; but it may be no less true that the defendant regarded the stipulation as one which would be respected by the company; and my inference, from what appears, is, that it was practically respected, although perhaps all the directors may not have been in the secret.

The evidence justifies the assumption that Mr. Laidlaw was an influential member of the provisional board, even if his was not the controlling influence. He tells us that while the defendant expected a contract, he was determined that he should not have one upon this road; and that the defendant considered himself badly used because he did not get one. He does not contradict the defendant's statement of the understanding about the connection between his subscription and the contract, though he does

not in terms confirm it. It may not be uncharitable to suppose that, under the circumstances, it may not have seemed undesirable that the defendant should not have a voice in the management of the company, and that there would be therefore a somewhat willing recognition of the terms of the subscription. However this may be, it appears that in order to raise the \$30,000 it was necessary to have ten per cent. paid upon the whole subscribed stock, including the defendant's \$5,000. Where the \$30,000 came from does not appear, but it does appear that no part of it came from the defendant, and that he was never pressed or even asked to pay his share. The reason of this forbearance is not directly stated by any one; but the fact is shewn, and so is the further fact that the existence of a grievance on his part was well known.

When I look for any evidence of direct notification, or intimation even by way of routine, that the defendant was looked to or appeared on the company's books as a holder of stock, I find absolutely none. Notice of calls was given by advertisement in the *Gazette*, not by being addressed to shareholders individually, and in the *Gazette* the individual shareholders were not named. Letters are said to have been written, and dunning circulars sent from the office, but the only evidence as to them is the general statement of the secretary that he directed them to be sent. He does not prove the sending of any one of them to any body. The fact that they were sent rests on his belief in the fidelity of his clerks, and that any one was addressed to the defendant is a matter of the vaguest inference. The presumption against its being sent, if presumption could be lawfully resorted to, is, in my judgment, rendered much stronger by all the known circumstances than an opposite presumption.

I can readily understand that the defendant may not have expected to receive any formal notice of allotment, and I should be disposed to think that the same was true of every one of the subscribers. I think it very likely that every one of them considered, as soon as he signed

the book, that he was a shareholder and liable to pay whenever called upon. But I do not see my way to import that idea into the contract, and to vary its terms by denying to the company the power to allot or refuse to allot which the document gives. I cannot make an absolute contract to give shares on the one side and to take them on the other, out of what in its terms is not absolute.

I cannot see on what tenable ground I could have denied to the company the right to refuse to allot shares to the defendant. I think the company might lawfully have answered to any application made by him: "We do not choose to allot you any shares. We understand that, by reason of something between you and Mr. Laidlaw about a contract, your feeling is hostile to the company, and much as we require money, we prefer not to have you among the shareholders."

This may be the most unlikely thing in the world to have happened; but it seems to me it was the legal right of the company, and that the measure of obligation is the same for both parties. I have considered also whether the fact of the general allotment, without exception, aids in the way of evidence. I cannot see that it does so. An allotment to the defendant individually, while it would only have been part of what was necessary to complete the obligation of the defendant, might have afforded some ground to look on whatever evidence of notice there was, in the light most strongly supporting the view that what was begun had been completed; but I cannot find in the general terms of the minute of 1st July anything to relax the duty of shewing with reasonable certainty that notice in some way reached the defendant.

Some of the findings of the learned Judge at the trial are, therefore, in my apprehension of the evidence, successfully impugned by the defendant. He found, first, that the defendant subscribed for fifty shares. This is undeniable. Secondly. That fifty shares were allotted to him by the company. This was, I think, clearly the effect of the action

of the provisional board on the 1st of July, 1869, so far as the first step towards an effectual allotment was concerned. Thirdly. That the company sent notice to him of calls. Of this I can find no legal evidence. I find that the only notice of calls, given as such, was a general notice in the *Gazette*, which gave no information to any one who read it as to who the parties were who were expected to pay. I find also that the secretary directed circulars to be sent to persons who were expected to pay. These were not notices required by any statutory duty, or duty prescribed in any other way, so as to have that official character which might justify the reception of entries by the clerk whose duty it was to send them, as presumptive evidence that they were sent. They were voluntary acts, done for the purpose of accelerating payment by those to whom they were sent. But, such as they were, there is neither entry nor other evidence of them produced; but only the secretary's statement, in general terms, that he instructed them to be sent, and that it was the business of one of the clerks in the office to send them. Setting aside the defendant's denial of the receipt of any such notice, which is as strong evidence that they were not sent, as proof of the sending would be that they were received, there would not be, in my judgment, anything in the evidence of the secretary fit to submit to a jury as evidence of the mailing, much less of the sending in any other way, of any one of those circulars to the defendant.

In connection with this part of the third finding I refer to the *fifth*, which is: "I cannot say that the defendant received actual notice of the allotment; but I find that the company, by notices sent to his address, gave him notice of their considering him a shareholder." I have just explained why I do not think there was any evidence of the sending of any notice; but assuming, for argument's sake, that all the circulars were sent to and received by the defendant, I am not prepared to assent to the proposition that, no notice of allotment having been given before that the company could, after all the business of organization,

election of directors, giving of contracts, &c., &c., had been done, fall back on the original subscription list, and by an intimation that they considered a subscriber whom they had not invited to take part in the earlier stages of the business as liable to pay calls, create such a liability.

I think this would be the effect of holding that a circular sent under the circumstances spoken of, operated as notice of allotment.

If it were contended that, though ineffectual as an original notice of allotment, it afforded evidence in support of the inference that an earlier notice had been given, a good deal would have to be shewn by way of acquiescence or the like, which there is no pretence of here.

The other findings are, under *thirdly*—"And that his name was published in the *Globe* newspaper as a shareholder, and that he was at the time of such publication a subscriber to the *Globe*."

I have already alluded to the fact of the publication in October, 1869. I am unable to see the significance of either the fact of the publication or the knowledge of it by the defendant, which he denies, and which is not found as a fact, upon the question before us. *Fourthly*, the learned Judge finds that all was done by the company to give the defendant a claim against the company for the stock, and to have any benefits that might accrue therefrom.

This last finding does not involve the converse, that the defendant was bound. I do not assume to say decidedly that I do or do not assent to it as a conclusion of law and fact, because I am not sure upon what facts it is arrived at. But taking the facts which we know, as evidence that the resolution of 1st July, 1869, was passed—the certificate issued and placed in the brokers' hands with their receipt indorsed for the ten per cent. with instructions to receive the ten per cent. and hand over the certificate to the defendant, I think the fourth finding was so far established, that if the defendant had discovered what had been done it was in his power to avail himself of the allotment. But if the company had given express notice of those acts, and

the defendant had refused to pay the ten per cent. and accept the stock, and months afterwards, when the burden and heat of the day had been borne by others, he had come forward and insisted on being recognized as a shareholder from the beginning, there would have been formidable difficulties in his way if the company disputed his claim.

My opinion, at which I arrive with fears that I may have overlooked something of importance, since so many of my brother Judges have held differently, is in favour of the defendant upon both the principal points raised for him. I do not think the plaintiff's case is established by the facts which are found; and I do not think there was evidence of the fact of the sending of the notices. And my examination of the evidence has not enabled me to discover any other facts, which can reasonably be regarded as shewing that the defendant knew or had notice of the allotment.

I therefore think the appeal should be allowed, with costs.

MORRISON, J. A.—I concur in the judgment just delivered by my brothers Burton and Patterson. I fail to see that any evidence was given at the trial of notice to the defendant that stock had been allotted to him. The evidence from which we have been asked to infer such notice is loose and inconclusive, and, in my opinion, altogether insufficient to prove such a notice or fix liability on the defendant. To render a person liable clear and distinct evidence should be given to fix such a liability, and we ought not to be left to mere conjecture of witnesses that the notice was given. It is, I think, clear that the notice of allotment (Exhibit 3) was never sent or communicated to the defendant; it was handed to the company's brokers and they returned it, as Mr. Campbell, the broker who held it, testified he had no recollection of ever seeing the defendant about it, or speaking to the defendant about it, or asking about it; in fact, all that is shewn about it is, that the brokers returned the notice of allotment to the com-

pany; that the circumstances appearing in the case very strongly indicate that the directors of the company at the time did not look to the defendant as a subscriber to whom stock was to be allotted, or that it was intended he should be included in the general order of allotment, probably because the promoters of the company were aware that the defendant had only conditionally subscribed. The fact that the company, although they themselves were pressed for money, did not at any time take steps to enforce from the defendant payment of calls, or even to ascertain why he did not pay them, during the seven or eight years before this action, the defendant being a gentleman of ample means, living in the same city with and well known to the directors, the officers of the company, and its brokers, goes very far to support the contention of the defendant. I may also remark that the fifth finding of the learned Judge who tried the cause is a finding that the defendant did not receive notice of the allotment of shares to him. The learned Judge uses the words actual notice. As said by Baron Bramwell, in *Gladstone v. Padwick*, L. R. 6 Ex. 211, "the word actual is of no peculiar force." Actual notice means no more than notice. So I regard the fifth finding as amounting to a finding that there was no evidence of any notice of allotment. As I take the law applicable to this case to be, that a notice to the defendant of so many shares being allotted to him was a condition precedent before he could become a shareholder and be made liable for calls, that not being done here, it appears to me an untenable proposition that a notice to the defendant requesting payment of a call, (not previously liable as I have said), can make the defendant, or render him liable as, a shareholder. And assuming he received such a notice, he was not, in my opinion, bound to pay any attention to it.

On the whole, I am unable to discover any evidence, to use the language of Mr. Justice Gwynne in the Court below, shewing that there was any "response, either in writing or verbally, or by conduct, communicating to the

defendant that the company had accepted him as the holder of the subscribed shares."

I think the appeal should be allowed.

Moss, C. J. A.—I have the misfortune to differ from my learned brethren. I readily confess that the result of repeated discussions, and of the perusal of their written judgments, has been materially to shake the opinion I had formed. Indeed, I am not prepared to say whether, if I had been the Judge of first instance, I should or should not have decided against Mr. Manning; but, after weighing to the best of my ability the cogent and striking arguments which have been advanced, I have not been able to satisfy myself that I can properly lend my voice to depriving the plaintiff of the verdict and judgment he has been fortunate enough to obtain.

It is conceded that in view of the decisions of this Court the only question now open for controversy is, whether the fact that the company had allotted to the defendant the shares for which he applied was in some way communicated to him within a reasonable time. As I understand the conclusions of fact drawn by the learned Judge who tried the action, he does not seem to have entertained any doubt that the defendant was perfectly well aware that he was accepted as a shareholder of the fifty shares. He expressly finds that notices of calls had been sent, and refers to other circumstances from which it might fairly be inferred that the defendant knew that his application for shares had been accepted. Although the denial of the defendant led the learned Judge to refrain from pronouncing any opinion upon the question of whether he had received actual notice of any allotment, it is impossible to read his findings without perceiving that, in his judgment it had been established that the defendant had full knowledge that he had been accepted as, and was deemed to be, a shareholder. For my own part I should have thought, but for opposing opinions which I cannot disregard, the defendant's own candid statement to be decisive against the contention now raised on

his behalf. He knew perfectly well that scarcely one-third of the capital stock had been subscribed, and that there was not the least chance of any application for shares being met with a refusal. I have not the least idea that the defendant had any expectation of receiving a notice of allotment, except in so far as it might be incidental to or an accompaniment of a first call.

The fair interpretation of the defendant's own evidence is, that the shares were allotted to him, but that he was not to be called upon to pay, or was to cease to be a shareholder, unless he received a contract for building the road. From it I have no difficulty in drawing the inference that it was never intended, or expected by him, that any notice of allotment should be given. If the contract for construction had been awarded to him, he would have felt bound to pay without any further step being taken by the company except giving notice of the calls. His language upon this point appears to me to be unmistakable in its import. Take, for example, his statement in the case of *Jaffray v. Manning*, (a). He said: "I supposed that if I had got the contract I should have been in the same position as any other stockholder. I subscribed to the Toronto and Nipissing on the same terms. They were separate transactions, but Laidlaw was acting in both as the prime originator. We got the contract for the Nipissing. I paid up my stock in full in this * * When my tender was rejected, I did not consider I had any stock * * I would have been a shareholder, if I had got the contract." The circumstances disclosed in the evidence with reference to the organization of the company, and the intention of the provisional directors to use the Toronto subscriptions as an inducement to the municipalities along the line to grant bonuses, are also full of significance. But confining ourselves to the defendant's own view of his position, nothing remains to be observed

(a) This was on the examination of the defendant in that case before a special examiner, and put in at the trial herein as an exhibit.

except that the failure to obtain the contract does not absolve him from liability. We have already had occasion in other cases to explain our views upon this contention, and I see no reason for applying any different rule in the present case.

It may be that the officers of the company felt that they could not without injustice compel Mr. Manning to pay for his shares, because he had been led to subscribe by special inducements which had not been realized, and that for this reason they never intended to press him for payment; but their motives cannot impair the rights of the plaintiff as a creditor.

I am conscious that I have allowed myself to be largely governed by what I understand to have been the conclusions in fact drawn by the learned Judge who tried the case. The propriety of this in a general sense will not be disputed. I may be mistaken in my view of their import, but I cannot but think that that view is strongly confirmed by the circumstance that he afterwards concurred in the judgment now under review. I am, however, by no means dissatisfied that the other members of this Court have arrived at a different conclusion, for I have always felt that it involved a good deal of hardship to Mr. Manning to require him to pay this large sum after the lapse of so many years.

Per Curiam.—Appeal allowed, with costs, and rule made absolute to enter a verdict in the Court below for the defendant.

Appeal allowed.

SILVERTHORN V. HUNTER ET AL.

Negligence—Liability of valuator for.

The defendant, who was employed on behalf of the plaintiff to value certain lands, intended to certify the value at \$2000, but through the fraud of the agent he was induced to certify for \$3000.

Held, affirming the decree of BLAKE, V.C., 26 Gr. 390, that the defendant was not liable for any loss sustained by the plaintiff.

Held, also, that the circumstances of this case would not justify the Court in reversing the finding of the Judge of first instance, that the valuation was made without fraud or intention to deceive.

Per BURTON, J.A.—A valuator is not liable for negligence in making a valuation of land, on which a loan is procured, unless it be fraudulently made.

APPEAL from the decree of Blake, V. C.

It appeared that the plaintiff had advanced certain money upon the faith of a certificate, which the defendants had given, stating that the lands offered in security were of the full value of \$3,000, at a forced sale by auction. Default being made in payment of the mortgage, the land was afterwards sold under a decree of the Court, when it only realized \$1,270. Upon a bill being filed to compel payment of the deficiency, the defendant Hunter answered, setting up that he only intended to sign for \$2,000, but that through the fraud of the plaintiff's agent he was induced to certify for \$3,000. The bill was *pro confesso* against defendant Brown. The agent, whose evidence was taken before the hearing, denied the charge, but the learned Vice-Chancellor discredited his testimony and dismissed the bill. The case is reported 26 Gr. 390, where the facts are more fully stated.

The case was argued on the 10th of March, 1880 (*a*).

T. Ferguson, Q. C., for the appellants. The evidence shows that the defendant Hunter, in the certificate of value given by him, upon which the appellant relied and acted, was guilty of misrepresentation as to his opinion of the value of the lands in question. He did not really consider

(*a*) *Present*. — HAGARTY, C. J. Q. B., BURTON, PATTERSON, and MORRISON, J. J. A.

that the lands were worth more than two thousand dollars, and were an ample security for the sum of \$1,500; and even should it be held that Hunter would not have been responsible for an erroneous opinion as to the value of the lands if honestly and truly stated, yet it is contended that having made the false representation, knowing and intending that the same should be acted upon, he should be held liable to make good the loss that the appellant has sustained thereby. The witness McLellan not being the agent of the appellant to procure the certificate, even were it true that it was signed by Hunter without having read it himself, and that it was inaccurately read to him by McLellan, yet Hunter, by so signing it, adopted as his own the statements therein contained, and is responsible for their truth. And admitting that the certificate was signed by Hunter before the answers to the questions contained in the report to which it is appended were inserted, the evidence establishes that the defendant knew that it was the intention of McLellan to insert the answers and complete the report, and in signing the certificate referring to the report without satisfying himself as to its correctness and of the certificate as well, the defendant, knowing the use that was to be made of them, was guilty of gross carelessness, and the report and certificate having afterwards been produced to the appellant, containing the false and fraudulent statements alleged in the amended bill, and the appellant having relied and acted upon the same, the defendant should be held liable for the loss which the appellant sustained thereby. The learned Vice-Chancellor, before whom the cause was heard, improperly permitted questions in violation of the rules of evidence, and notwithstanding objections thereto, to be put to and answered by the witnesses called for the purpose of impeaching the credibility of McLellan, but for which the evidence of this witness, who was not present at the hearing of the cause, would have appeared differently; and the learned Vice-Chancellor was in error in discarding his evidence as unworthy of belief. But for his

so doing the conclusion of his Lordship would probably have been an entirely different one; and it is contended that under the circumstances the evidence of McLellan should not have been so rejected. In any view of the case, even that most favourable to Hunter, he has been shewn to have been guilty at least of such gross negligence as renders him liable to the appellant. He cited *French v. Skead*, 24 Gr. 179; *Langridge v. Levy*, 2 M. & W. 529, 4 M. & W. 337; *Hart v. Swaine*, L. R. 5 Ch. D. 42; *Barry v. Crosky*, 2 T. & H. 18, 24; *Re Randolph*, 1 App. R. 315; *Foster v. Mackinnon*, L. R. 4 C. P. 704; *Chard v. Meyers*, 19 Gr. 358; *Armstrong v. Gage*, 25 Gr. 1.

Boyd, Q.C., for the respondent. The certificate of valuation which Hunter signed is only a statement of his opinion, upon which, as such, the plaintiff would have no right to fix him with liability for the difference between the actual and estimated value: *Scottish-American Investment Co. v. Hope*, 26 Gr. 430, and cases collected therein. There is no sufficient evidence in this case that Hunter was a paid valuator. In any event it is quite untrue, as represented by the bill, that the plaintiff paid anything to Hunter, and there is no privity between them. The evidence clearly established, as the learned Vice-Chancellor found, that McLellan was the person who deceived Hunter, and induced him to sign a false certificate, and that he, McLellan, was at that time the agent of the plaintiff; this being so, any loss arising from McLellan's misconduct must fall upon the person employing him. It is not proved that the defendant Hunter knew the amount of the proposed loan, or that the plaintiff was the person by whom the money was to be lent, and it cannot be said that the certificate was signed with intent that the plaintiff should act upon it. It is of the essence of the plaintiff's case that he should establish not only a false but a *fraudulent* representation on the part of Hunter, but the evidence wholly fails to prove this. On the contrary, the conclusion of the Judge is well founded, that Hunter is an honest and truthful man, and that he is guiltless of any moral fraud in the matter. Hunter's neg-

ligence, even if it be conceded, will not avail to support the bill if the element of dishonesty or moral turpitude be wanting: *Collins v. Evans*, 5 Q. B. 804, reviewed in 5 Q. B. 820, and *Haycraft v. Creasy*, 2 East 92, wherein Lawrence, J., says, "without fraud there be no cause of action," and LeBlanc, J., says, "by fraud I understand an intention to deceive." In the present case it is found, and properly so, that the *mala mens* was absent in so far as Hunter is concerned. This being so, the plaintiff has failed to establish, as pleaded in his bill, that the defendant "*fraudulently misrepresented*" the said property and the value thereof. He referred to *Taylor v. Ashton* 11 M. & W. 401; *Childers v. Wooler*, 3 E. & E. 287; *Gray v. Turnbull*, L. R. 2 H. L. Sc. 53; *Colonial Securities Co. v. Taylor*, 29 U. C. R. 376; *Cassie v. Cochrane*, 20 Gr. 552.

March 27, 1880. BURTON, J. A.—Had this been an action on the case for a fraudulent misrepresentation instead of a bill in equity, it would have required an overwhelming case of miscarriage on the part of the jury to induce a Court to interfere with their decision on the facts. It would, I think, be an anomaly if the decision of a Judge, to whom the plaintiff has elected to leave the determination of his case, were treated with less respect than that of a jury.

Mr. Ferguson admitted the force of the rule which has been so frequently adverted to in this Court and elsewhere, that in cases generally the Judge of first instance, who has the advantage of seeing the witnesses and forming an opinion of their veracity from personal observation, should not have his decision lightly set aside, but he contended that it should not be invoked on the present occasion, because MacLellan, one of the witnesses whom the learned Judge has discredited, was not examined in open Court, and therefore he was in no better position of judging of his evidence than the members of this Court, but it is impossible for any one reading that witness's testimony to come to any other conclusion upon it than that it is wholly unworthy

of credit. Had the learned Judge come to a different conclusion, and credited that testimony, and on that account disbelieved the defendant Hunter, there might be some force in the contention; as it is, it is the ordinary case of a Judge coming to a conclusion upon the *vivâ voce* evidence of a witness examined before himself, which this Court, not having the same opportunities of testing, is called upon to reverse.

I am free to admit that I should have been very slow to believe the statement of the defendant Hunter that he was not fully aware of the contents of the few lines of writing to which he attached his signature, when taken in connection with the further circumstance, that before this action was brought his attention had been twice drawn to the fact that he was charged with having valued the property in question at \$3,000 at a forced sale, and instead of repudiating that valuation, or pretending that he had been entrapped into signing something different from what he intended, he merely excuses himself by saying he had no interest whatever in misrepresenting the value, and that he had valued it in good faith; nor do I think his explanation at the hearing at all satisfactory. These were, however, all matters for the consideration of the learned Judge in weighing the testimony and coming to a conclusion upon it, and were no doubt urged before him, and we can only therefore conclude that the evidence was of a character to remove the suspicion which one is inclined to form upon its perusal in the appeal book, and that it is not a case therefore in which we are in a position to reverse his finding. It is a different thing when a Judge draws wrong inferences from the facts proved. No doubt cases do occur in which, as has been expressed in a judgment of the Privy Council, "the Judge below had so plainly, manifestly, and clearly erred upon the face of the evidence," that an Appellate Court would be bound to reverse the judgment; but the mere circumstance that this defendant has by his own confession been guilty of almost criminal negligence, knowing the purposes for which his valuation was sought, and that

he did not on first becoming aware that he was charged with signing such a valuation indignantly deny it, are not in themselves sufficient to induce us to say that the Judge who credited such a witness was necessarily in error. It is precisely in such cases that the explanations of the witness, when subjected to cross-examination in open Court, and in the presence of the Judge, become so important, although perhaps one of the most difficult duties imposed upon a Judge is to decide whether the apparently fair manner and demeanor of the witness be real or assumed.

I think, therefore, it is impossible to interfere with this decision unless we can give effect to the argument urged before us, that the conduct of the defendant amounted to such gross negligence as would be sufficient in itself to sustain the suit.

No case has been cited for such a proposition. A case was indeed referred to by the learned counsel for the appellant, in which a Court of Equity held that negligence as applied to cases of constructive notice might, without fraudulent motive, be so gross as to justify the charge of constructive notice; but we were not referred to any such rule in reference to cases of this description, and the authorities appear to be entirely opposed to it, indeed I assume it can admit of no doubt that if a declaration were framed, charging that the defendant falsely and negligently made a representation, knowing that it was intended to be acted upon by the plaintiff, and that it was so acted upon to his injury, without any averments that it was false to his knowledge or fraudulently made, it would be bad on demurrer.

In *Taylor v. Ashton*, 11 M. & W. 415, an action for false and fraudulent representation, the jury found the defendants not guilty, but expressed their opinion that they had been guilty of gross negligence; and it was insisted that that, accompanied with a damage to the plaintiff in consequence of the negligence, would be sufficient to give him a right of action, but from this the Court dissented, holding that, independently of any contract between the parties, no one

could be made responsible for a representation of the kind unless it be fraudulently made.

In fact all the cases from *Pasley v. Freeman* downward lay down the general rule of law to be, that fraud must concur with the false statement to give a ground of action. See *Evans v. Collins*, 5 Q. B. 820; *Ormrod v. Huth*, 14 M. & W. 651; *Thom v. Bigland*, 8 Ex. 731.

I was at first inclined to think that this suit might not be maintainable, inasmuch as it is not clear that the plaintiff may not have acted on the representation of Brown, but if it had been shewn that this false representation had been fraudulently made by the defendant, the onus of proof would have been shifted, and it would have been incumbent, I think, upon the defendant to prove to demonstration that it was not relied on. It would not be sufficient for him to say there were other representations by which the transaction may have been induced, nor can he be heard to say what the plaintiff might have done had no misrepresentation been made by him: *Smith v. Kay*, 7 H. L. C. 770; *Nicols's Case*, 3 DeG. & J. 388; *Rawlins v. Wickham*, 3 DeG. & J. 318.

It is not, however, necessary to consider that question, as in the face of the finding of the learned Vice-Chancellor, that this statement was made by the defendant under the circumstances sworn to by him, and therefore without any intention to deceive, this suit cannot be maintained.

I am of opinion, therefore, that this appeal should be dismissed, with costs, and the judgment below affirmed.

HAGARTY, C.J.Q.B., PATTERSON, and MORRISON, JJ.A., concurred.

Appeal dismissed.

MITCHELL V. GOODALL.

Equitable assignment.

By the terms of a deed of surrender of a lease of a farm to the plaintiff, the lessee W. was to have the privilege of reaping or selling the fall wheat sown, on payment of the rent in advance, or securing it by 1st of October, 1878. On that date arriving without such payment or security, the plaintiff refused to allow its removal, whereupon W. offered to give plaintiff an order for \$299.85, the amount of rent alleged to be due, on the defendant, a commission merchant to whom W. was accustomed to send his grain for sale, if defendant would accept it. The plaintiff accordingly saw defendant, who said he would accept it if it was all right, and drew up an order in plaintiff's favour, which W. signed. The grain was then shipped to defendant, and sold by him. Before the grain arrived, or at all events before it was sold, W. verbally notified defendant not to pay plaintiff, and the defendant requiring written notice, W. wrote defendant stating that he had found plaintiff's account incorrect, and not to pay plaintiff without further instructions. The defendant thereupon, although expressly notified by the plaintiff's solicitor, that the plaintiff insisted on his right to be paid, paid over the amount of the order to W.

Held, affirming the judgment of the Queen's Bench, that there was a good equitable assignment, and the plaintiff was therefore entitled to recover.

THIS was an appeal from a judgment of the Court of Queen's Bench, making absolute a rule *nisi* to enter a verdict for the plaintiff, 44 U. C. R. 398. The pleadings and facts are fully stated there, and in the judgments on this appeal.

The case was argued on the 20th November, 1879 (*a*).

McMichael, Q.C., for the appellant. All the definitions shew that an equitable assignment relates to goods or funds in the hands of another, and never to property or funds in the hands or possession of the assignor: *Field v. McGaw*, L. R. 4 C. P. 660; *Watson v. Duke of Wellington*, 1 R. & M. 602, 605; *Griffin v. Weatherby*, L. R. 3 Q. B. 753. While the wheat was in the hands of Wood, who, to use the words given in the evidence of the plaintiff, "could do what he liked with it," there could be no equitable assignment; any promise that he made respecting it was without consideration, and no third party at that time

intervened who had any claim or control over it, or interest in it, or in whose hands it could be attached. Although the plaintiff said he forbade Wood taking the wheat away, the fact that the wheat was in the barn of McArthur, the tenant, with no restraining clause in McArthur's lease, shews that the forbidding was an empty menace, and that Wood did not receive, nor did Mitchell give up, anything for the promise Wood made. It is therefore submitted that until the wheat came into the hands of the defendant it could not be the subject of an equitable assignment, and that any order upon the defendant before that took place would have been inoperative: *Addison v. Cox*, L. R. 8 Ch. 68; *Buller v. Plunkett*, 1 J. & H. 441; *Webster v. Webster*, 31 Beav. 393; *Somerset v. Cox*, 33 Beav. 634; *Yates v. Cox*, 17 W. R. 20. The order given by Wood after the wheat came into the hands of the defendant to pay McArthur would, at all events, take precedence. The plaintiff and defendant differ in their statements as to what took place in the office of the latter. The defendant says he heard and knew nothing of the arrangement which the plaintiff speaks of, and that his promise was that he would pay the amount if it was all right, and, on his shewing, there was no notice that could operate by way of estoppel. If, in reality, the plaintiff could not control the wheat in Wood's hands, he had no right to expect it would come to him, and under those circumstances any promise the defendant made would be without consideration. But the plaintiff's statement that he intended to call and get the defendant to accept the order shews that he did not regard the defendant as having then made a complete contract. The count mentioned in the judgment of Hagarty, C. J., and which it was proposed in Term should be added, was not on the record at the trial, and has never been served on the defendant or pleaded to, nor has the defendant been asked or received notice to plead to it. But it is not sufficient in law, because it shews no consideration for the alleged promise. If, however, the Court should hold that it does disclose a

consideration, then we contend that the consideration has not been proved. The only consideration suggested is, that the plaintiff was induced thereby to give up some lien or control he had on the wheat. If this is alleged in the count, which defendant contends is not done, it is not proved. Whatever may have been his assertion of claim, in reality he had no claim, or lien, or right to stop the wheat, and nothing to give up. There was no contract by which the defendant was entitled to have the wheat sent to him, so as in the slightest degree to divest Wood of his absolute control. This circumstance, which was strongly insisted on by Cameron, J., who dissented from the judgment of the Court, was also alluded to by Hagarty, C. J., who said: "I have not seen any case in which this aspect was presented." If there was a good equitable assignment, of course only notice to the person in whose hands the fund was attached would be necessary. But if there was no one in a position to receive such notice, then there could be no assignment; there would be but two persons actors, not three. And if it is said that the promise made by defendant operated as an equitable assignment the answer is, that as the promise was without consideration, he had no right to bind himself to control another man's property when it should come into his hands, unless he had received irrevocable authority from that man to do so, which it is contended he had not. If Wood could do as he pleased with the wheat before it left his hands, notwithstanding anything defendant might say, he had a right, when he consigned it to defendant, to control its sale and the application of the proceeds. The defendant submits that, under any circumstances, the Court, instead of entering a verdict for the plaintiff on grounds not urged at the trial, should, if they were not satisfied with the verdict, have ordered a new trial: *Gibson v. Minet*, 2 Bing. 7; *Dickinson v. Marrow*, 14 M. & W. 713; *Malcolm v. Scott*, 3 Hare 39, 51; *Llanelly Railway Dock Co. v. London and North-Western R. W. Co.*, L. R. 7 H. L. 550; *Hosier v. Lord Arundell*, 3 B. & P. N. R. 7.

J. E. Rose, for the appellant. The verdict is sustainable

on the first count of the declaration, and the evidence discloses an assignment of a chose in action, bringing the case within *Brice v. Bannister*, L. R. 3 Q. B. D. 569. It is said there was no contract between Wood and the appellant under which money was payable by the appellant to Wood, and which Wood could assign. In *Brice v. Bannister* one Gough agreed to build a vessel for Bannister: Bannister agreed to pay a certain price: Gough assigned the money thus agreed to be paid, but unearned at the time of the assignment: the money when earned passed under the assignment to Brice. In the present case Wood agreed with the appellant to ship to him grain to be sold: the appellant agreed to sell and pay the proceeds to the order of Wood: Wood gave an order to the appellant to pay the respondent: the grain was shipped: the money became payable, and passed under the order operating as an assignment to the respondent. It is further objected that if the grain had not been shipped the money would never have become due. So in *Brice v. Bannister*, if Gough had not built the vessel, the money would never have been earned. The objection is taken that the appellant could not have enforced the contract against Wood. Even if, for the sake of argument, we concede that there was no contract made between Wood and the appellant entitling him to sue Wood for damages on a breach, the evidence discloses an enforceable contract to which the appellant, the respondent, and Wood were parties; and a contract enforceable at the suit of the respondent against Wood and the appellant—it may be by bill in equity. Such contract is as follows: Wood and the respondent agree that if the respondent will permit Wood to ship the grain he will secure his rent by shipping to the appellant, and assign to the respondent the proceeds arising from the sale of the grain. The respondent assents to this, and the appellant agrees with the respondent and Wood to accept the grain, sell the same, and pay over the proceeds pursuant to the order of Wood. It is urged that the respondent had no control over the grain, but we submit that he had under the agreement endorsed

on the lease; however, a sufficient consideration is shewn if both parties supposed such a right or power existed: see *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449. It is clear that both Wood and the respondent thought the respondent could control the wheat, otherwise Wood would not have given the order. It is difficult to see how the right of the appellant to enforce the contract against Wood could enure to the respondent's benefit. The respondent could only recover if the money became payable, and any damages that the appellant might recover against Wood for breach of contract would not pass to the respondent under the assignment. It was not necessary that the money should be due at the time of the order, or earned, or in the hands of the third party: *Brice v. Bannister*, L. R., 3 Q. B. D. 569; *Buntin v. Georgen*, 19 Gr. 167; *Re Thirkell Perrin v. Wood*, 21 Gr. 492, 504; *Langton v. Horton*. 1 Ha. 549, 556, 557. See also *Dickenson v. Marrow*, 14 M. & W. 713. The appellant could have saved the whole trouble in this case by interpleading, which he should have done: *Ryall v. Rowles*, W. & T. L. C., 4th Am. Ed., 1564. The count added in term was so added without objection, formed the basis of argument, and is embodied in the judgment. No objection was raised by the appellant either on the argument or delivery of judgment by the Court of Queen's Bench. The appellant did not then suggest any desire to either plead or demur, and if the pleadings are considered defective, and the evidence sufficient to support the verdict, the respondent now asks leave to amend his pleadings to meet the evidence. The result of the appellant's contention would be this: that while before his promise Wood and the respondent both supposed that the respondent could control the grain until the rent was paid, the latter thus being in a position to secure the payment of his rent, the promise then given by the appellant led the respondent to give up his claim, and placed Wood in a position to defeat any attempt to recover the rent, and left the respondent helpless. All of which would have been avoided had the

appellant not perversely acted on his own judgment or inclination in utter disregard of the respondent's rights. The equities of the case are clearly with the respondent: *Row v. Dawson*, 1 Ves. Sen. 331; *Jones v. Farrell*, 1 DeG. & J., 208; W. & T.'s L. C. 4th Am. Ed., 1562-1565; *Burn v. Carvalho*, 4 M. & C. 690; *Gurnell v. Gardner*, 9 Jur. N. S. 1220; 12 Cush. 37; *Erans v. Morley*, 21 U. C. R. 547; *Gooderham v. Hutchinson*, 5 C. P. 241; *Rankin v. Atfar*, L. R. 5 Ch. D. 786.

March 2, 1880. Moss, C. J. A.—The difficulties which were raised in my mind by the forcible arguments advanced by Mr. Justice Cameron have disappeared, since I correctly apprehended the facts. During the argument I was under the impression that the plaintiff was resting his rights, to a large extent, upon the existence of an assumed right to distrain, which I could not discover. It is clear, however, that the plaintiff himself was not placing his claim upon this foundation. I do not see in the evidence the slightest trace of an assertion of such a right upon his part. But I now perceive, what I confess I failed to realize during the argument, that the plaintiff had a very substantial interest of a different kind in the wheat, out of the proceeds of which he expected the defendant to pay his claim. So far as I can judge from the report of the evidence, there is much reason for believing that the plaintiff was the legal owner of the wheat, and that Wood had no more than a right to get it upon paying or securing the plaintiff's rent. But at least it appears to me to be quite certain that Wood could not recover or obtain possession of the wheat without making payment or giving security. I think that not only in law, but in fact, was the plaintiff in a position to prevent him from taking it without respecting his rights. In law the contract gave the plaintiff this protection; in fact the guardianship of his tenant made him practically safe. Unless, therefore, the defendant had entered into the undertaking which the plaintiff now seeks to make him fulfil, the wheat would not have reached the

defendant's hands, but would have been available to the plaintiff. Under these circumstances, it does not seem to me that elaborate argument is necessary to establish that the defendant was liable to the plaintiff if the wheat reached his possession, and its proceeds came into his hands. I do not feel troubled by any speculations as to what might have been the result if Wood had, notwithstanding what had occurred, chosen not to send the grain to the defendant. It might have been well for the defendant, if he had taken that course, however fraudulent it would have been toward the plaintiff, unless indeed the defendant has received some indemnity.

I have had occasion to examine carefully the cases relating to equitable assignments, and I have quite misapprehended their effect, if they leave the smallest room for doubt that, under the circumstances of this case, the defendant is liable, I think that if the facts were as they appeared to Mr. Justice Cameron, and as in some degree they appeared to me upon their presentation in argument, there would be much to be considered before differing from that learned Judge; but I think it not improbable that if the view of the facts which I now believe to be correct had been presented to his mind, he would, like myself, have considered that the whole complexion of the case was changed.

I think that the appeal must be dismissed, with costs.

PATTERSON, J. A.—The plaintiff's right to recover, upon the facts shewn by the evidence reported to us, seems to me to be perfectly free from doubt.

I should content myself with referring to the summary of the evidence given, in his judgment in *banc*, by the learned Chief Justice of the Queen's Bench, before whom the case had been tried, were it not that some things shewn by the documentary evidence have a material bearing upon arguments adduced before us; and these points are not distinctly noticed in that summary.

The plaintiff, who is the owner of a farm in Vaughan,

had let the farm to one Wood for a term of seven years, from the 1st of March, 1875, at \$525 a year. The rent was payable annually on the first day of January, the first payment falling due on the 1st of January, 1876, being thus payable partly in advance.

Wood, the tenant, executed a surrender dated the 31st of October, 1877, for the nominal consideration of one dollar. This document, though dated the 31st of October, I should imagine was not really executed until a month later, because an agreement, endorsed on each part of the lease, and apparently forming part of the transaction of the surrender, bears date the 30th of November, 1877. This agreement is what strikes me as material evidence on one point for the plaintiff. If it was really an independent agreement, unconnected with the surrender, its effect would be strengthened rather than weakened. It provides that the plaintiff is to pay Wood at the rate of \$2.50 per acre on the 1st of April, for fall ploughing done by Wood, to the extent of sixty acres; and provides also for the wheat in the ground. The memorandum as endorsed on each part of the lease is not verbatim the same. On plaintiff's copy it is said that Wood is "to have the privilege of reaping or selling the fall wheat now in the ground by paying rent in advance, or giving security, and also that the wheat must be threshed on the place, and no straw to be allowed off." On Wood's copy the words are, "Thomas Wood to have privilege of reaping or selling fall wheat now in ground, no straw to leave the place. Thomas Wood to give security for payment of rent by the 1st of October, 1878."

The legal position thus appears to have been this: By the deed of surrender the term was destroyed, and the farm reverted to the plaintiff as it was, with fall ploughing done and fall wheat sown. But (probably as the true consideration for the surrender) the plaintiff was to pay for the ploughing by the 1st of April, about which time we may suppose his incoming tenant would be able to utilize it for his spring crops. In addition to this, Wood was to have

the right to reap the wheat he had sown, or to sell it to the incoming tenant or any one else, if he chose to continue to pay rent. But the plaintiff makes this privilege conditional on Wood's paying the rent or securing it by the 1st of October, 1878. This is called paying in advance, perhaps with reference to the terms of the lease, under which it would not have been payable till the 1st of January following; or perhaps meaning only before the 1st of October, which was probably understood to be the earliest date at which the wheat would be removed. I infer from the terms of the order afterwards given that the rent was to be paid up to the 1st of September. I understand from the plaintiff's evidence that the lease to McArthur, the incoming tenant, secured Wood's privileges; but as that lease is not before us, I have not the advantage of correcting my understanding of the agreement of the 30th of November, by reference to its terms.

The 1st of October approached without the rent having been either paid or secured. The plaintiff objected, as well he might, to the removal of the wheat until security was given. He had protected himself by the agreement, which made Wood's right to the wheat conditional on payment being made or security given; and he insisted on the observance of that agreement. In the argument before us, it was assumed that the plaintiff was asserting a right to distrain the wheat for his rent; and on the undoubted proposition that he had no such right, was based the contention that the acts of Wood in what followed were voluntary acts, or acts unsupported by sufficient consideration. The fallacy was in supposing that the plaintiff, when he objected to the removal of the wheat, was in effect threatening a distress. He was simply saying, "the wheat was to be yours only on fulfilment of a condition which you have not fulfilled."

Wood yielded to the plaintiff's demand, but not by way of averting a distress; there is not a hint in the evidence that such a proceeding was ever mentioned or thought of. The plaintiff having written to him, as he says, informing

him that he wanted security for the rent before he could ship the grain, Wood telegraphed to him that he would come and see about the matter before he shipped. Accordingly, on 2nd October, Wood comes to the plaintiff's office and there makes out a statement, with which the plaintiff was satisfied, of the amount he owed. He made the amount \$299.85; and as it was his habit to send his grain to the defendant, a commission merchant, for sale, it was agreed that the plaintiff should see the defendant and ascertain if he would accept Wood's order in the plaintiff's favour for \$299.85. The plaintiff accordingly went to the defendant. Of this interview the defendant says in his evidence: "When Mitchell came first he asked if we would pay an order from Wood. I said 'Yes, if it is all right.' I think there was reference made to the grain. He spoke of Wood sending some wheat. He knew that Wood was in the habit of sending us wheat. He asked what an order was like, and after I told him what it was like, he asked me to write a form, and I did so."

The plaintiff's account of what took place differs chiefly by the statement, which the defendant denies, that he told the defendant that he would not let the grain leave the place unless security was given.

It does not strike me as material how this was.

The order was on the same day filled up and signed in the presence of the defendant. It was in these words:

"Toronto, Oct. 2, 1878.

"J. GOODALL,

"Please pay W. A. Mitchell, Esq., two hundred and ninety-nine $\frac{85}{100}$ dollars, together with interest at one per cent. per month, on above, from 1st September, 1878 from proceeds of my consignment.

THOMAS WOOD."

Before the grain arrived, or at all events before it was sold, Wood told the defendant not to pay the money to the plaintiff. The defendant says he required directions in writing, whereupon Wood gave him the following notice:

"Maple, Oct. 7.

"MR. GOODALL,

"This is to notify you that I have found the account, for which Mr. Mitchell has my order on you, to be incorrect, and advise you not to pay it without further instruction. By so doing you will oblige

THOMAS WOOD."

Wood says, in his evidence, that he discovered errors in the calculation on which he gave the order. He does not mention the nature or extent of these errors, and makes no pretence of having referred to the plaintiff to have them corrected. If there was really a mistake in the amount, or if Wood thought so, his written notice to the defendant would not seem unreasonable.

It did not countermand the order, or dispute the plaintiff's right to be paid out of the wheat whatever was due him. It is so worded as not necessarily to mean more than that the writer wished the money retained till he had an opportunity of adjusting the amount. What the defendant did, however, was to pay over the whole to Wood; and he did this advisedly and deliberately, and after an express notice from the plaintiff's solicitors that the plaintiff insisted on its being paid to him.

I think it is very clear that Wood gave the plaintiff an equitable assignment of the wheat, or of the money it should produce, to the extent of the sum mentioned in the order. The very essence and intention of the arrangement between them was that the wheat should only pass into the control of Wood, so as to allow him to ship it to the defendant, subject to the plaintiff's right to be paid his rent out of it. The defendant had abundant notice of this; and, apart altogether from the effect of his own agreement to pay the money to the plaintiff, he received the wheat, knowing that, as between Wood and the plaintiff, the latter was interested in it to the extent of the money in question; and that, as between them, it was agreed that the money should be paid by the defendant to the plaintiff out of the proceeds of the wheat. The case

is not one of a mere order to pay over money, which under certain circumstances might be lawfully revoked before payment made. Wood had no power to revoke the order.

It was given, as I have shewn, upon a sufficient consideration, and as part of a transaction which vested in the plaintiff an interest in the wheat: not a legal interest perhaps, as no part of the wheat had been specifically appropriated to him, but certainly an equitable interest.

I am not in a position to say very precisely whether the plaintiff may not have had a legal interest. I have not seen the lease to McArthur, and I do not know to whom the wheat would have belonged if Wood had refused to comply with the terms on which he was to have it, by paying or securing the rent. I therefore do not venture to say whether, as a matter of law, the plaintiff was, under the circumstances, receiving a charge upon the wheat from Wood, or was not merely parting with his already existing interest in it, or giving up an actual lien upon it, except as to the value of \$299.85. However this may be, the plaintiff had, at least, an equitable interest or charge, of which Wood could not deprive him without his consent.

We have been referred to a number of authorities. So far as they apply to the facts before us, they are, I think, decisive in the plaintiff's favour. There have, however, been but few, if any cases, so far as my observation has gone, in which questions at all similar to those debated before us have arisen, and in which the facts supporting the contention that an equitable assignment had been made were so strong as those to which I have adverted.

One of the most instructive of the cases is *Rodick v. Gandell*, both by reason of the exposition of the law of equitable assignments by Lord Langdale (12 Beav. 325) and by Lord Truro (1 DeG. M. & G. 763), and on account of the references made by those eminent Judges to earlier decisions. The facts in that case differed essentially from those before us. Gandell and Brunton having claims against several railway companies, and at the same time being indebted to a bank, which was

represented by the plaintiff, authorized Messrs. Pinniger and Westmacott, who were solicitors for the companies but were not empowered to act for them in transactions such as that in question, to receive from the companies the moneys due to Gandell and Brunton and to pay them into the bank to their credit; Pinniger and Westmacott agreed to do so, and the bank accepted that agreement as security for Gandell and Brunton's debt.

Moneys were received, as contemplated, by the solicitors; but instead of paying them to the bank as agreed, they handed them over to Gandell and Brunton, who became bankrupt. The bank sought to establish that there had been an equitable assignment of the money, but failed both before the Master of the Rolls and afterwards on appeal to the Chancellor.

The distinction between that case and the present is very apparent when we refer to some of the remarks made upon the facts disclosed by the evidence. Lord Langdale, after discussing the evidence, said (p. 337): "There is no direction nor any agreement to direct the companies to pay the debt to the bank; no direct agreement between Gandell and Brunton and the Bank proved, but Gandell and Brunton authorize Westmacott to receive something in which he had no interest present or future, vested or contingent. He had a mere authority from Gandell and Brunton, which was communicated to the bank, with Westmacott's promise or undertaking. The cases of possible legacies or of freight to be earned, appear to me to be very different, as in those cases there is a possible interest in property, upon which when acquired the assignment may operate; but Westmacott had nothing upon which any assignment could operate. It does not appear that the mediation or interference of Westmacott was in any way required to make an equitable assignment, which might probably have been effected without him, by an agreement on the part of Gandell and Brunton with the bank, that the debts due from the railway companies to Gandell and Brunton should be charged with or made

applicable to the payment of the debt due to the bank, and a further agreement to give the necessary directions for that purpose, but this, whatever was the intention, was not the course pursued."

In the case before us we have Wood, the debtor and owner of the wheat, agreeing with the plaintiff, who was the creditor, that he shall be paid out of the wheat; and giving directions to the defendant, into whose control he was about to place the wheat, to pay the plaintiff out of it—all the elements which were noted by the Master of the Rolls as wanting in *Rodick v. Gandell*.

Lord Truro discusses the case in much the same strain, but also adduces reasons founded on the position, relation and conduct of the parties for holding that no assignment was intended. He drew the conclusion (p. 781) that prudent reasons existed why no arrangement should be made which should operate as an assignment, and why the bank should be satisfied with the undertaking of Pinniger and Westmacott to pay to the bank what moneys should come to their hands; reasoning the very opposite of that indicated by the facts before us.

In the judgment of both the Courts that case was reduced to a question of the existence of a binding agreement by solicitors to pay over the money in case they should receive it; and that was a question which at that time belonged to the jurisdiction of the Courts of Law, not those of Equity.

Referring to the judgments, however, for the general doctrines enunciated, we find the Master of the Rolls saying, at p. 329, "There is no doubt but that a creditor, by ordering or directing his debtor to pay the debt to another person, may, in equity, effectually assign the debt to such other person; and it appears by the case of *Burn v. Carvalho*, 4 My. & Cr. 690, that an equitable assignment may be made effectual, by a distinct promise and agreement to apply a fund in an agent's hand in a particular manner, and to give directions for that purpose to the agent."

This rule would seem to apply with great force to the facts before us. Wood has the fund in his own hands, viz.,

the wheat; he proposes to place it in the hands of an agent, viz., the defendant, to convert into money; he distinctly promises and agrees to apply the fund to the particular purpose of paying the rent to the plaintiff; and he not only promises to give directions for that purpose to the agent, but actually gives them.

The Master of the Rolls proceeds: "It is settled, also that in equity there may be a valid assignment of funds or property to be subsequently acquired, even in cases where the acquisition depends on contingencies and possibilities only." The question of law chiefly discussed in the judgment of Lord Truro, was whether the letters which evidenced the arrangement constituted a valid equitable assignment of the debts due from the several railway companies according to the law of the Court, as pronounced by Lord Eldon in *Ex parte South*, 3 Swanst. 392, and by Lord Cottenham in *Burn v. Carvalho*, 4 My. & Cr. 690.

The dictum of Lord Eldon is quoted as follows: "If a creditor gives an order on his debtor to pay a sum in discharge of his debt, and that order is shown to the debtor, it binds him." And that of Lord Cottenham, thus: "In equity an order given by a debtor to his creditor upon a third person, having funds of the debtor, to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund." The Lord Chancellor then referred to a number of cases to shew that the principle so laid down by his predecessors upon the woolsack had not been extended so as to include a case like that before him, the leading features of which I have already mentioned.

The principle is the same stated in the extract I have just made from the judgment of Lord Langdale.

The case of *Brice v. Bannister*, L. R. 3 Q. B. D. 569, relied on by Mr. Rose, is very much in point, although, like most others on the subject, it dealt with facts which left more room for questioning the alleged assignment than those with which we are concerned.

One Gough was building a vessel, under a contract, for the defendant. He gave an order to the plaintiff, his

creditor, for payment of £100 out of the contract price. The defendant was notified of the order, and in place of accepting it he declined to be bound by it. When the order was given Gough had been paid more money than he had earned under his contract; and the defendant made further advances to him to enable him to carry on the work; so that, although more than £100 of the contract money was unpaid, and a still larger amount unearned when the order was given, there never was a time when Gough could have said the defendant owed him money. Lord Coleridge, before whom the action was tried, decided that there had been an assignment of £100 within the meaning of the Supreme Court of Judicature Act, 1873, 36 & 37 Vic. ch. 66, sec. 25, sub-sec. 6, under which the action was brought. He seems to have had no doubt of the validity of the assignment in equity. On appeal, his judgment was affirmed by Cotton, and Bramwell, L.JJ.; Brett, L.J., dissenting, because he disapproved of the application of the doctrine of equitable assignments in cases like that one, as they hampered and impeded business transactions, by exposing the purchaser to the risk of the failure of the contractor, without leaving it in his power to secure the expenditure of the contract money by the contractor upon the work. These reasons for the dissenting judgment, forcible as they undoubtedly are, are obviously inapplicable to an assignment made in the circumstances we are considering.

Some of the cases cited in the judgment in the Court below relate to the form of the action. *Griffin v. Weatherby*, L. R. 3 Q. B. 753, and *Walker v. Rostron*, 9 M. & W. 411, which are referred to, and other cases which might be added, such as *Frühling v. Schroeder*, 2 Bing. N. C. 77, and *Patorni v. Campbell*, 12 M. & W. 277, strongly support the plaintiff's right to recover for money received by the defendant for his use. They affirm the doctrine that an agent receiving money for his principal, and agreeing, in accordance with an order from the principal, to pay the money to a third person, becomes liable to the third person

for money received for his use. But I think the plaintiff has a more direct ground for charging the defendant in this form of action. The right of the plaintiff to be paid out of the wheat, whether that right be described as an equitable assignment, or a charge, or a joint ownership, was known to the defendant. He received the wheat and the money it produced, not as wholly belonging to Wood, but as belonging, to the extent of \$299.85, to the plaintiff. I perceive no reasonable ground for denying the plaintiff's right to succeed on the ground on which Mr. Justice Armour has based his judgment, viz., for money received by the defendant for his use.

In my opinion, the appeal should be dismissed, with costs.

BURTON and MORRISON, J.J.A., concurred.

AGAR V. STOKES.

Landlord and tenant—Rent to be refunded in case of fire—Cesser of term.

A lease of a mill, and ten acres of land adjoining, for five years at the rent of \$500 for the first year and \$550 for each of the four succeeding years, payable half-yearly in advance, contained the usual covenants and provisions amongst which was the covenant to pay rent, without any exception as to fire, and to keep in repair, accidents by fire excepted; and the lease concluded with the following clause:—"Should the mill be rendered incapable by any fire, or tempest, then the portion of rent for the unexpired portion of the term paid for in advance, to be refunded by the lessor to the lessee," but there was no provision in such event for the cesser of the term.

Held, BURTON J.A., dissenting, reversing the judgment of the County Court, that the effect of the whole instrument was, that the destruction of the premises by fire, not merely gave a right to a return of a proportionate part of the current half-year's rent, but put an end to the whole term, and therefore that the lessor was not entitled to recover rent for the half year succeeding such destruction.

APPEAL from the County Court of the County of Grey.
The plaintiff sued for money received to his use, to

recover back a portion of an instalment of rent paid on a lease from the defendant.

The lease was dated the 4th of July, 1877, and demised to the plaintiff, "All that messuage or tenement, situate, &c., and being composed of the Pleasant Valley Mills, on lot No. 12, in the 6th concession of the township of St. Vincent, with so much of the land belonging to the said William Stokes there as lies on the west side of the river and south of a line drawn, &c., containing by estimation ten acres, be the same more or less," for five years, to be computed from the 1st of August, 1877, at the rent of \$500 for the first year, and \$550 for each of the four succeeding years, to be payable half-yearly in advance, on the 1st of August and 1st of February in each year, the first payment to be made on the 1st of August, 1877. There was a proviso, "that this lease, and the term hereby created, may be determined and put an end to by three months' notice, in writing, given at the end of the second year of said term by the said party of the second part." The lease contained the usual re-entry clause for nonpayment of rent, with covenants to pay rent, and to keep the demised premises in good repair, reasonable wear and tear and accidents by fire and tempest excepted, with other usual covenants; and the document concluded with the following clause, "In case of a bursting, or any accident happening to the flume or tank, the party of the first part to furnish sufficient lumber and timber to repair the same. Any machinery that may be placed in said mill by Agar to be taken out by him, or purchased by Stokes at a valuation at end of term. Agar to have the use of the picks staff, proof staff, and set of scales and weights now in the mill. And should the mill be rendered incapable by any fire or tempest, then the portion of rent for the unexpired portion of the term paid for in advance to be refunded by Stokes to said Agar."

The defendant pleaded by way of set-off that the plaintiff was indebted to him, defendant, for one half-year's rent due, under the lease, on the 1st of August, 1879, as a payment in advance.

To this the plaintiff replied that the lease was subject to a proviso, that if the mill should be rendered incapable, by fire or tempest, the term should at once cease and determine; and averred, that before the accruing of the rent mentioned in the plea, the mill was rendered incapable by fire and tempest. The defendant rejoined by setting out the lease in full, and the plaintiff demurred.

The learned County Court Judge held, that the lease was not determined by the destruction of the mill, and gave judgment for the defendant.

From this decision the plaintiff appealed.

The case was argued on the 5th of March, 1880 (*a*).

Bethune, Q. C., for the appellant.

J. Morrison, for the respondents.

The arguments sufficiently appear in the judgment.

The following cases were cited: *Pulver v. Williams*, 3 C. P. 56; *Finlayson v. Elliott*, 21 Gr. 325; *Sheldon v. Sheldon*, 22 U. C. R. 621; *Denison v. Denison*, 21 U. C. R. 57; *Woodfall on L. & T.*, 11th ed., 471; 2 Wms. Saund. 838; *Wilkes v. Steele*, 14 U. C. R. 570.

March 27th, 1880. PATTERSON, J.A.—It does not appear upon this record what money it is which the plaintiff claims as received by the defendant for his use. It has been stated at the bar to be money which he became entitled to have refunded in consequence of the mill having been “rendered incapable by fire.” This is not a matter of importance, because the questions arise upon the set-off pleaded by the defendant.

The question presented is, whether the effect of the accident, which “rendered the mill incapable,” was to put an end to the term, as alleged in the replication, or in any way, upon the true construction of the lease, to deprive the landlord of any further claim for rent.

The immediate point for construction is the effect of the

(*a*) *Present*.—BURTON, PATTERSON, and MORRISON, J.J.A.

concluding words of the lease upon the reddendum ; because the covenant upon which the defendant relies is to pay according to the reddendum, that being the effect of the agreement to pay "the said half-yearly rent hereby reserved, at the times and in the manner hereinbefore appointed for the payment thereof."

Combining the two members of the lease we read thus : Yielding and paying therefor yearly, and every year during the said term, the sum of \$500 for the first year, and \$550 for each of the four succeeding years, to be payable half-yearly in advance ; and should the mill be rendered incapable by any fire or tempest, then the portion of rent for the unexpired portion of the term paid for in advance to be refunded by Stokes to said Agar.

The defendant's contention is, that this only entitles the plaintiff to a return of a proportionate part of the current half year's rent, for whatever time has to elapse between the damage done and the 1st of February or August, as the case may be, and that every subsequent gale of rent must be paid till the end of the five years, notwithstanding that the mill has been burnt down : that, in other words, he may be entitled to receive \$273 or only \$2, according as the mill may happen to be destroyed on the second day of the half year, or on the last day but one, or nothing at all if the disaster occurs on the last day ; but must pay in advance on the first day of the next half year, as usual, and so on to the end ; and he supports this view by relying on the express covenant to pay, which he contends is not qualified, and by arguing that there is nothing in the lease to put an end to the term because the mill happens to burn down, and that the plaintiff will still have the ten acres of land.

The argument for the plaintiff is, that the principal subject of the demise was the mill ; that, in fact, was what he was paying rent for, the land being only an accessory or appurtenance, not intended for separate use or profit ; and the consideration failing when the mill was destroyed, it was just, and was what the lease contemplated, that the

rent should cease, and that the term should cease also ; and he points to the expression used, which is, "the portion of rent for the unexpired portion of *the term*," not of the *current half year*, as confirmatory of his view. And then, reading the last clause as providing that all rent paid in advance from the time of the disabling of the mill, for any portion of the term unexpired, is to be refunded, he urges that even if the original covenant to pay in advance can be held still to compel such payments, the concluding stipulation requires the money to be instantly returned, and so in this way also his liability is cancelled.

I cannot see any room to doubt that the intention was, that the rent and the term should cease when the mill was "rendered incapable." Any other supposition would be contrary to the reasoning of ordinary common sense. That idea is not mere conjecture founded on what one may imagine to have probably been the case, but it is supported by the last clause in the lease, which, apart from whatever may be the binding force of its language, shews that the contingency of destruction by fire or tempest was present to the minds of the contracting parties ; and by the other covenants, which shew that in such an event neither party bound the other to rebuild. They evidently undertook to make provision for the contingency, and we must credit them with the intention to make some adequate, or at least substantial provision, which would certainly not be the effect of the defendant's reading of the lease.

In my opinion we ought to read the reddendum, qualified by the last clause, as reserving rent for the term, *or* until the mill should be "rendered incapable," and the covenant, as a covenant to pay the rent so reserved. If we look for authority for so dealing with the document, I think we may find it in the principle on which the case of *Hayne v. Cummings*, 16 C. B. N. S. 421, was decided. One question there was, whether a right of re-entry for breach of covenants or conditions could be enforced for violation of certain agreements which, being in an instrument which was not a deed, were not properly covenants or conditions. Byles,

J., said, at p. 427: "I apprehend it is a sovereign rule in the construction of all written documents, to give effect to the intention of the parties as expressed in the instrument itself, and to give effect if possible to every word, or at all events to every provision. It is plain the landlord meant to have the security of the land for the performance of the stipulations contained in the agreement. It is true there is no covenant or condition, strictly so called, to which the proviso for re-entry can apply. What, then, are we to do? Are we to defeat the just intention of the parties by a rigid application of the rules of law? The case seems to fall very much within the quaint expressions of Lord Hobart, in the *Earl of Clanrickard's Case*, Hob. 277, where that very learned Judge says: 'I do exceedingly commend the Judges that are curious and almost subtle, *astuti* (which is the word used in the Proverbs of Solomon in a good sense when it is to a good end), to invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury which, by rigid rules, might be wrought out of the act.' That being so, we are to be *astute*, if necessary, to put such a construction upon the words 'covenants' and 'conditions' as will best give effect to and carry out the intention of the parties to this agreement. All we do is, to construe this to be an executory agreement, and to give the construction to the word covenant which it has received in many documents, in ancient as well as in more modern times—even so early as the celebrated covenant touching the thirty pieces of silver. If we do not so read the word, it becomes wholly inoperative."

Let us apply this last test to the document before us. Omitting the words "for the unexpired portion of the term," the sentence will read thus: "then the portion of rent paid in advance * * * to be refunded." What rent should we understand from this reading was to be refunded? Every gale of rent from the beginning had been paid in advance: would any one suppose it was all to be given back? Obviously not. It would naturally

and clearly mean only that the rent for the unexpired portion of the current half-year, being unearned, should be repaid to the tenant. What force then do we give to the phrase, "for the unexpired portion of the term?" According to the construction for which the defendant contends, it seems to me we give no effect to it, but leave it wholly inoperative; while, as the plaintiff invites us to read the clause, it indicates the understanding of the parties that from the moment of the disabling disaster the rent was to cease, and all rent paid and unearned, for whatever portion of the term, then unexpired, it had been paid, should be refunded. I am sure we give effect to the intention of the parties, and I think we do no unjustifiable violence to the language they have employed, in giving it this interpretation.

Counsel for the defence has not omitted to press the argument that, as there is no express provision for the cesser of the term, the plaintiff may hold the ten acres of land, rent free, till the end of the term. If this should be the result, it will be only a question of degree, not of principle; because, on the defendant's own contention, the plaintiff was to be rent free for some part of the time, viz., for that period in respect of which the rent was to be refunded. If this period should necessarily run on to the end of the term, the defendant may have to regret that the form of the lease left such a question open.

For my own part, I am not apprehensive of the surmised result, or that the principle of construction on which I have dealt with the plaintiff's covenant, which is all we have definitely to construe, will prove too weak or narrow to govern both sides of the contract.

I think the appeal should be allowed, with costs, and judgment given for the plaintiff on the demurrer.

MORRISON, J.A.—I am also of opinion that this appeal should be allowed. The reasons for this opinion have been so fully investigated and expressed by my brother Patterson, that it is unnecessary for me to do more than declare my general concurrence in his judgment.

BURTON, J.A.—Although I am unfortunately compelled to come to a different conclusion from that arrived at by the majority of the Court, I am pleased to think that my learned brothers have not felt the difficulty which presses me, as I am convinced that their judgments are more in accordance with the true merits.

I fully recognize the rule referred to by my brother Patterson, that this instrument ought to receive that construction which will best effectuate the intentions of the parties to be collected from the whole lease, and that greater regard is to be had to the clear intention of the parties than to any particular words used in the expression of their intent.

I am also of opinion that it sufficiently appears from this lease that the mill, and not the land, was the substantial matter of the demise; otherwise we should expect to find, not that the portion of the rent for the unexpired portion of the term for which it was paid in advance should be refunded, but a certain proportion of that unearned portion.

But however improbable it may appear that these parties should have stipulated for the refunding of a portion of the half-year's rent, paid in advance, and still have consented to pay during the remainder of the term, we are bound to give effect to the words the parties have actually used, notwithstanding the reasonable conjecture that they may have intended something different.

Here, then, is an absolute covenant to pay the rent in advance at certain stipulated periods, according to the reddendum; no exception being made by reason of fire or tempest, although such a contingency was present to the minds of the parties, as we find provision made for it in the covenant to repair, and also in the proviso which is relied upon by the lessee, which is in these terms: "And should the mill be rendered incapable by any fire or tempest, then the portion of rent for the unexpired portion of the term paid for in advance to be refunded." It is proposed to read this as if it had been expressed, "the portion of the rent for the unexpired portion of the term shall cease, and that part paid for in advance be refunded."

This was probably the real agreement between the parties. I think it not unlikely that they supposed that on the subject matter of the demise being destroyed, the rents would cease, and that it was only necessary to provide for the refunding of that portion which had been paid in advance. If that really was the agreement between the parties, the remedy must, I apprehend, be sought in the reformation of the lease; but I am unable to ascertain anything on the face of the lease which will warrant a Court placing the construction contended for upon these words.

In *Doe v. Godwin*, 4 M. & S. 264, a lease contained covenants *followed* by a proviso for re-entry, to take effect upon breach of any of the covenants *hereinafter contained*, and there were no further covenants after the proviso. The Court held themselves bound to construe the proviso according to the letter, and as inapplicable to the covenants before.

In *Fowell v. Tranter*, 3 H. & C. 458, a lease expressed to be determinable in seven or fourteen years, "if the parties shall so think fit," was construed literally as determinable only on consent of both parties, notwithstanding the reasonable conjecture that it was intended to give the option to either of them respectively.

Bramwell, J., there says, at p. 461, "The golden rule of construction is, that words are to be construed according to their natural meaning, unless such a construction would either render them senseless or would be opposed to the general scope of the instrument or unless there be some very cogent reason of convenience in favour of a different interpretation. I see none here. The words naturally import that the joint assent of both lessor and lessee shall be necessary to the determination of the lease. Possibly the parties may have intended it to be determinable at the option of either, but if that were the intention I have great difficulty in understanding how the clause has been expressed as it is. * * The words are sensible when interpreted according to their natural meaning, and, except for such reasons as I have enumerated, I think they should be so interpreted."

Here the words are sensible, and refer to the portion of the rent for that part of the unexpired term which has been paid for in advance.

In *Mallan v. May*, 13 M. & W. 511, Pollock, C.B., uses this language: p. 517, "We must apply the ordinary rules of construction to this instrument, and though by so doing we may in some instances, probably in this, defeat the real intention of the parties, such a course tends to establish a greater degree of certainty in the administration of the law."

I refer also to *Great Western R. W. Co. v. Rous*, L. R. 4 H. L. 650, where Lord Westbury observed, p. 659, that "the safer and wiser course for a Court of Justice is to follow the plain literal meaning and interpretation of the words used, unless it can clearly find in some other part of the instrument a rule for their construction that overrules the obligation of abiding by the literal meaning, and enables you to give a more or less extended interpretation of the words."

Applying these rules to the case before us, I think the learned Judge in the Court below was right, and that this appeal should be dismissed, with costs.

Appeal allowed.

WESTERN ASSURANCE COMPANY V. PROVINCIAL INSURANCE COMPANY.

Reinsurance—Non payment of premium—Custom—Principal and agent.

The defendants executed policies, acknowledging the receipt of the premiums for reinsurances, which their agent at St. John had accepted, and sent them to him for delivery, but afterwards hearing that a loss had occurred, and that the premiums had never been paid, they instructed him not to deliver the policies. The plaintiffs alleged that it was the custom of agents to give each other credit for such premiums, and to settle at the end of the month, when the balance, if any, was handed by one to the other; but no knowledge by defendants of such a course of dealing, nor such a course of dealing on the part of their agents, was proved, and it was shewn that their agents had no authority to re-insure, except upon payment of the premium.

Held, affirming the decree of BLAKE, V.C., 26 Gr. 561, that the defendants were not liable.

Held, also, that even if such a custom had been proved to exist between local agents, it would not be binding on the company, unless authorized by it.

Held, also, that the defendants were not under the circumstances bound by their admission on the policy of the receipt of the premium.

Xenos v. Wickham, L. R. 2 H. L. 296, distinguished.

THIS was an appeal from a judgment of Blake, V.C., dismissing a bill filed by plaintiffs against defendants, praying that two policies of re-insurance might be ordered to be delivered to the plaintiffs, and that it might be declared that the plaintiffs have a valid claim against the defendants upon the said contracts of re-insurance for the sum of \$2,000 and interest thereon. The judgment is reported in 26 Gr. 561, where the facts are fully stated.

The case was argued on the 13th March, 1880 (a).

Bethune, Q.C., for the appellants. The payment of the premium was not a condition precedent to the contract of re-insurance in question here, which distinguishes the case from *Walker v. The Provincial Insurance Co.*, 7 Gr. 137. It was clearly established that a custom existed between the local agents of the appellants and the respondents, with the knowledge of the head office, to credit each other for

(a) *Present*—BURTON, PATTERSON, and MORRISON, JJ.A. and GALT, J.

the premium until the end of the month. The learned Vice-Chancellor has not proceeded upon the evidence of Doyle at all, and has not found whether he believed Doyle or not. It is submitted that Doyle's evidence is not reliable. His own letters and conduct are entitled to much greater weight than his testimony given at the hearing, and in so far as his evidence is in conflict with his letters and conduct, and the evidence of Street and Reeves, it ought not to be acted on. The policy which the respondents issued expressly acknowledged the receipt of the premium, and they are now estopped from saying that it was not paid. Having executed the policy and sent it to their agents to deliver, sufficient was done to constitute a delivery to the appellants: *Xenos v. Wickham*, L. R. 2 H. L. 296. Independently, however, of the policy, the appellants are entitled to succeed, as there was a good parol contract for re-insurance: *Wright v. London Life Insurance Co.*, 5 App. R.; *Insurance Co. v. Colt*, 20 Wall. 566. He also cited *Parsons v. Queen Insurance Co.*, 4 App. R. 103.

McCarthy, Q.C., and *Creelman*, for the respondents. The application for the re-insurance contained the following stipulation: "The company will not be liable for loss unless the premium has been previously paid," and upon each of the policies issued by the respondents was endorsed, amongst other conditions, the following: "No insurance, whether original or continued, shall be considered as binding until the actual payment of the premium." There was, therefore, no binding contract of re-insurance entered into between the parties; but even if such a contract were entered into, it clearly appears that the payment of the premium was understood to be and was a condition precedent to the right to recover thereunder, and as such condition was not performed there can be no recovery. The appellants failed to establish a universal custom amongst insurance companies, under which re-insurance premiums were collected at the end of the current month. The evidence on this point only went so far as to shew that, for convenience, a practice or custom of that kind existed

between certain insurance companies, and that such practice or custom was a matter of contract between such companies, but it was not proved that any such contract existed between the appellants and respondents, except at the head offices of the respective companies at Toronto. The respondents' agent at St. John had no authority from the respondents to bind them by a contract of insurance without payment of premium, and it does not appear that in this case he did even assume to so bind them. It was proved that he was expressly directed by the respondents' inspector, who was his superior officer, to collect the premium from the appellants' agent at St. John and that he did demand payment thereof, but that the premium was not paid. Although the policies were issued by the respondents, yet the claim of the appellants was repudiated by the respondents as soon as they ascertained that the premium had not been paid: *Walker v. Provincial Insurance Co.*, 7 Gr. 137, 8 Gr. 217, 5 U. C. L. J. 162; *Montreal Insurance Co. v. McGillivray*, 8 W. R. 165, 13 Moo. P. C. 87; *Acey v. Fernie*, 7 M. & W. 151; *Xenos v. Wickham*, L. R. 2 H. L. 296; *Henry v. The Agricultural Mutual Ass. Association*, 11 Gr. 125; *Goit v. National Protection Ins. Co.*, 25 Barb. 89.

March 27, 1880. BURTON, J.A.—There was no authority, in fact, conferred upon the local agent in this case to accept insurances, except by the issue of an interim receipt, upon payment of the premium, and the general rule was well known to the agents of both Companies, apart altogether from the special instructions claimed to have been given in this case, to insure only on an application being sent in upon the Company's form, and on payment of the premium.

We are asked to discredit the evidence of the inspector on this point; but, putting that evidence aside, how have the plaintiffs established any right to recover? If the evidence had established a course of dealing known to the principal, whereby assurances were effected by the agent without actual receipt of the premiums, the Company might

be deemed to have waived the special instructions, and the agent might be considered as acting within the scope of the authority which the Company, by such a course, would have held him out as possessing.

No such knowledge on the part of the Company is established here, nor such a course of dealing on the part of the agent; but, even if it had been shewn in the clearest manner that a custom existed between the agents of the two Companies in St. John to allow the premiums to stand as an item of general account between them until the end of the month, the Company would not be bound by such course of dealing, unless it could be shewn that he was authorized to effect insurances in that manner.

It was contended that *Walker v. The Provincial Ins. Co.* 7 Gr. 137, would only apply in case we could come to the conclusion upon the evidence that, as a matter of agreement, the payment of the premium was a condition precedent. That, however, is not the question. What the plaintiffs have to establish here is, that the agent had power to make such an agreement. That they have failed to do.

Mr. Bethune argued that the policy having been issued, in which the receipt of the premium was acknowledged, the Company are bound by that admission. But it is manifest upon the face of the policy that it was not intended to be a binding instrument until payment of the premium, and that it was forwarded to the agent to be delivered only in that contingency. "If I thought," said Mr. Justice Blackburn, in delivering his opinion in *Xenos v. Wickham*, L. R. 2 H. L. 296; "that the parties did not, in fact, intend the deed to be then finally binding, I do not think there would be any magic in the law to make it binding, contrary to their intention."

I am of opinion that the judgment of the learned Vice-Chancellor was correct, and should be affirmed.

GALT, J.—The facts of the case are very simple. The plaintiffs had an insurance in the town of St. John, N.B., for \$3,000. The party holding that policy applied for a further

insurance of \$2,000, which the plaintiffs agreed to grant, provided they could obtain a re-insurance to a similar amount. This took place on the 9th of June, 1877. On the same day their agent applied to the local agent of the defendants for such re-insurance. The inspector of the defendants happening to be in St. John went, in company with the agent of the plaintiffs and the local agent of the defendants, to examine the risk, and, having approved of it, agreed to recommend the re-insurance to the defendants. There was no formal written application. The plaintiffs' agent sent to the defendants' agent two memorandums: the first is as follows: "No. 130.—Schofield and Beaver of St. John. \$3,000 on their stock, &c., &c. Please re-insure one-third of our liability from 9th of June, 1877, to 26th February, 1878; 1% *pro rata*." The second is headed in the same way: "\$2,000 on a quantity of tea, &c., &c. Six months from 9th of June, 1877." These memorandums were attached to two of the usual forms of application used by the defendants, and having been marked approved of by the inspector, were forwarded to Toronto by the local agent. Upon receipt of these applications two policies of insurance were prepared by defendants and forwarded to the agent at St. John, on or about the 20th of June. No premium had been paid, nor had any interim receipt been given. The property was destroyed by fire on the 20th of June, and the manager of the defendants having ascertained that the premium had not been paid, instructed the local agent not to deliver the policies. It was proved that the agent Reeve had no authority to give credit for premiums. Mr. Harvey, the manager, in his examination states: "We tried in two special cases having general agents, but did away with them. All were then subject to the head office." I gave these agents no special instructions as to arranging for premiums. They had their instructions in the applications." Upon referring to the applications it will be found that at the bottom there is this note: "N.B.—The company will not be liable for loss unless the premium has been previously paid."

In the present case it was sworn both by Reeve, the agent, and Doyle, the inspector, that the latter instructed the former that he was not to give the interim receipt until the premium was paid. The latter, also stated that he told Mr. Street, the agent of the plaintiffs, "we would accept the risk, although the rate was low, as a matter of accommodation, but he must give me an application on a regular form of the Company and pay the premium in cash, which he said he would do: he said he would send it up." This is denied by Street; and if the case were confined to the contention between these parties on this point alone, it appears to me the plaintiffs would have great difficulty in maintaining their claim. Where the evidence is equal, the plaintiffs must fail, as it would be contrary to principle to transfer a loss from the plaintiffs to the defendants unless the evidence clearly established their right. I do not, however, decide the case on this narrow point. In answer to the clear proof that the local agent had no authority to grant interim receipts unless the premium was paid, it was argued that, by the custom or rather usage of insurance agents at St. John, particularly in case of re-insurances, credit was given, and the account was not settled until the end of the month in which the re-insurance was effected. The custom, such as it is, is thus described by Mr. Street: Q. "What is your general custom that you spoke about? What do you mean by the general custom, in the first place?" A. "If I re-insure, as I often do with other Companies besides the Provincial, I go to the agent, and ask him if he will accept a re-insurance on such and such a stock, as the case may be, and if he says yes, I say all right, it is effected, and he says yes, and I send up particulars and make a copy and send it to him sometimes if it is a very particular risk. If the agent has not seen the risk I generally give him the application, shew him my application or give him one filled up of his own, but that is not often done; then we accept the re-insurance, and I pay him the premium at the end of the month, and he does the same with me." He admits he knew that the policy of

defendants contained a condition that the policy was not to be enforced until the premium was paid. He admitted he had had only two transactions with the Provincial on account of the Western, in one of which the latter had re-insured the former, in which case the premium was paid at once, and the second is that now in question.

It was shewn that, as between insurance offices themselves, such a custom as that now asserted exists at the head offices, but it was not proved that such a custom was in force as respects local agents; nor do I think even if that were so it would be binding on their principals. The local agents have no authority whatever, I mean as respects these defendants, to do more than receive applications, on the form furnished by the company, and grant interim receipts upon receipt of the premium; and on the face of the application it is expressly provided that the company will not be liable for loss until the premium has been paid.

In the case before us the insurance, if any, was a verbal insurance; and it is manifest the agent had no authority to bind the defendants by such a contract. It appears to me it would be impossible for any company to carry on business with safety or prudence if such a contract as that now contended for was upheld. It is not pretended the custom extends to any other than re-insurances, and as it is contrary to the express authority given to the agents of this company, and is not shewn to have been known or sanctioned by them, in my opinion this appeal should be dismissed.

The case of *Xenos v. Wickham*, L. R. 2 H. L. 296, was relied on by the learned counsel for the plaintiffs, who contended that as the defendants had actually executed the policy, and enclosed it to their agent, it must be, on the authority of that case, considered as binding on them. Such, however, is not the view I take of the case relied on. It was there shewn that the policy had actually been executed, with the intention that it should be handed to the broker whenever he chose to call for it, the premium being considered as paid. In the case now before us the defen-

dants no doubt believed the premium to have been paid, otherwise they would not have executed the policy, or sent it to their agent for delivery. It must also be borne in mind, although on the face of the policy the premium is acknowledged to have been received, there is also an express declaration that the loss shall not be paid until the premium had been actually paid. It is true this appears to be a contradiction, but, in my opinion, if it is shewn, as was done here, that the premium had not been paid, the holder of the policy is not entitled to recover.

PATTERSON and MORRISON, JJ.A., concurred.

Appeal dismissed.

MOFFATT V. BOARD OF EDUCATION OF CARLETON PLACE.

School trustees—Change of school site—Specific performance.

Held, affirming the decree of PROUDFOOT V.C., that the board of education formed by the union of high school and public school trustees, had power to change the site for a school, and purchase another without a by-law or resolution of the county council, or the approval of the Lieutenant-Governor in council, and that the plaintiff was entitled to specific performance of an agreement by the Board to purchase land for such purpose.

APPEAL from a decree of Proudfoot, V. C., reported 26 Gr. 590.

The plaintiff's bill was filed for specific performance of an agreement by the defendants to buy from them a piece of land in the village of Carleton Place.

The agreement was dated 22nd December, 1877. It recited that the plaintiff had agreed to sell to the board, and that the board had agreed to purchase ten village lots for \$500, payable on or before the first day of December following, with interest at eight per cent. per annum from 26th October, 1877; then there was a covenant by the board to pay

the money, and a covenant by the plaintiff to convey upon payment, and to permit the board to occupy till default.

The answer in effect was that the agreement was *ultra vires* of the board.

It alleged that the object of making the contract was to change the place of holding the high school, and that no by-law or resolution of the county council authorizing such a change was passed by the county council as required by the High School Act, nor was any approval of such change given by the Lieutenant-Governor on the report and recommendation of the Minister of Education.

This was the whole illegality pleaded, but the answer contained some other statements. It averred that prior to the signing of the contract one Horace Brown, a ratepayer, had filed a bill praying to have the board restrained from further proceeding in the matter of changing the site of the schoolhouse, and from further proceeding in reference to the erection of a schoolhouse or letting contracts therefor, and that before the contract was signed notice of those proceedings was served on the board; but the officers of the board with undue haste, and at the request and solicitation of the plaintiff, improperly and contrary to the provisions of the statute, signed the contract: that the plaintiff knew of these proceedings, and that the proceedings of the board were irregular, and not warranted by the High School Act: that on the 26th of December, 1877, an injunction was issued restraining the board from *proceeding with the erection of the schoolhouse* on the site in the bill mentioned, which injunction was still in force; and that the board had never taken possession of the lands nor in any way accepted the title thereto. Therefore the answer submitted that the contract for the school site was void, and that the plaintiff had no right to specific performance of it; and prayed by way of cross-relief that it might be rescinded.

The Vice-Chancellor made a decree for specific performance of the agreement.

The defendants appealed.

The case was argued on the 11th March, 1880 (*a*).

Hodgins, Q. C., for the appellants. The proceedings of the board in the selection of the high school site in the pleadings mentioned, and in entering into the contract with the respondent, were unlawful, and in excess of the powers vested in it. In the exercise of their powers in respect of high school matters, the joint board is governed by the provisions of the High School Act, R. S. O., ch. 205, and cannot for such high school matters invoke the provisions of the Public Schools' Act, R. S. O., ch. 204: *Re Board of Education and Corporation of Perth*, 39 U. C. R. 51. Under the provisions of the High School Act, the board has no authority to select or make a contract for the purchase of a site for a high school; such power being vested in the county council: R. S. O., ch. 205, secs. 5, 11, 32, 39, 56, 68; *Malcolm v. Malcolm*, 15 Gr. 13. Besides, the contract in question was entered into after the respondents knew that the same was disapproved of by the electors of the high school district, and that litigation had commenced to restrain the board from carrying it out; and the contract was made in fraud of the constituents of the board. Under the writ of injunction in the suit of *Brown v. The Board of Education*, the board was restrained from further proceedings in respect of this contract, or in respect of the erection of buildings on the land in dispute.

Bethune, Q. C., for the respondents. The appellants had the legal right to acquire the property which is the subject of this suit: *Re Board of Education and Corporation of Perth*, 39 U. C. R. 34; *Re Niagara High School Board*, 1 App. R. 288; and the contract having been made and performed by the respondent, the appellants ought not now to be allowed to set up that it was *ultra vires*. The Court could not inquire into the question whether the ratepayers approved of the site of the school-house selected by the trustees. The proceedings in *Brown v.*

(*a*) *Present*.—HAGARTY, C.J.Q.B., BURTON, PATTERSON, and MORRISON, J.J.A.

The Board of Education, in the Court of Chancery, are not admissible in evidence in this suit, but even if admitted they merely establish that the plaintiff in that suit was opposed to the site which was chosen. Moreover the Court of Chancery so far dissolved the injunction as to allow the erection of the buildings. This contract, however, was entered into before the granting of the injunction in the case referred to, and it ought not to prejudice the plaintiff in this suit, as he was not a party to it.

March 27, 1880. PATTERSON, J. A.—The allegations in the answer relating to the injunction are outside of the controversy, as the injunction is not against the change of site or purchase of the land, but only against the erection of a contemplated school-house. It does not amount, as here stated, to any adjudication upon the right set up by the plaintiff's bill. The single question presented is, the power of the board of education to change the school site and purchase another without a by-law or resolution of the county council, or the approval of the Lieutenant-Governor; and this is the one question dealt with in the judgment which we are now asked to review. One cannot help expressing regret that in so many cases, of which this is an example, a single question of this kind, involving no disputed facts, should not be disposed of without putting the litigants to the expense and annoyance of a hearing and examination of witnesses.

The learned Vice-Chancellor decided against the defendants on the authority of *Re Board of Education and Corporation of Perth*, 39 U. C. R. 34, though not without some hesitation as to the construction of section 5 of the High Schools Act, R. S. O. ch. 205.

I think the decision in the *Perth Case* covers all the ground, and that that case was rightly decided.

The Act in force when the contract was made was 37 Vic. ch. 27, O., as amended by 40 Vic. ch. 16, O. The 36th section of that Act now forms section 5 in the R. S. O. ch. 205; but as there has been some change in the arrange-

ment of sections in revising the statute, it will be safer to refer to the original Act. By so doing we read section 36 as immediately following section 35, whereas in the revised statute another section has been interposed between them.

Section 35 enacts that "There shall be a high school or high schools, or collegiate institute in every county and union of counties, to be distinguished by prefixing to the words high school or collegiate institute the name of the city, town, or village, within the limits of which any high school or institute may be situate." There were a few words, not altogether unimportant to our present purpose, added to this section by 40 Vic. ch. 16, O., declaring that such high school or collegiate institute shall nevertheless be deemed to be one of the high schools or collegiate institutes of the county, and within the municipal jurisdiction of the county council.

This section so far dealt with the place of holding the school, as to attach to the school the name of the place where it was held, guarding (by the amendment) against that designation being taken to imply that the school was withdrawn from the jurisdiction of the county council; and then section 36 declared that the place of holding any high school in a county or union of counties may be changed at the end of the then civil year by the council of the county within which it is established, by a by-law or resolution passed for that purpose at or before the June session, and approved of by the Lieutenant-Governor on the report and recommendation of the chief superintendent. I see no reason to hesitate in reading section 36, when it speaks of the place of holding the school, as referring to the same place which, under the preceding section, gives its name to the school. I take "place of holding," to mean city, town, or village. By section 36 the council may change the school from one of those localities to another; or, by section 37, may, with similar approval, discontinue it in "any part of the county," which is another equivalent phrase, without removing it to or

establishing it in any other place, and by the section which became, by 40 Vic. ch. 16, the next section to section 37 (being numbered 39, but 38 being repealed), may establish one or more additional high schools in the county. I think that reading these sections, 35, 36, 37, and 39, together, the construction which would treat them as referring to the particular site in a town or village would be somewhat forced.

It has been urged by Mr. Hodgins, that in *Malcolm v. Malcolm*, 15 Gr. 13, Mowat, V. C., construed the word "place" in the corresponding clause of the School Act of that day as meaning "site;" and that, sec. 36 re-enacting that clause in the same terms, the Legislature must be deemed to have adopted that reading. The rule thus invoked is, no doubt, well established, and is in many cases a safe and useful rule. It is not applied only to the construction placed by judicial decision upon the words of a statute, but also to the interpretation which, being acted on for a great many years, must be taken to be known to the Legislature as that put upon the language: See *Mansell v. The Queen*, 8 E. & B. 73. It may perhaps be open to question, whether the rule should be recognized as so authoritative as to carry the assumption of knowledge on the part of the Legislature of every decision, however recently pronounced; of equal regard to all decisions of Superior Courts, whether in cases of importance or so trivial as not to justify the expense of an appeal, and whether those of a single Judge or the full Court; and whether it should be applied without discrimination to all kinds of legislation, to mere consolidations, which have of late years been not infrequent, as well as to legislation which may import more careful deliberation on the part of the Legislature. In *Sturgis v. Darell*, 4 H. & N. 629, we have an instance of balancing considerations for and against the conclusion that the Legislature had adopted a particular construction. But the present is not a case which the rule touches. There was no decision of the question in *Malcolm v. Malcolm*. The questions raised in

that case were under the Common School Acts, not those relating to grammar schools. It appeared as one of the facts shewn in evidence, that a resolution of a meeting of ratepayers in favour of a particular school site had been transmitted to the county council, and the council had passed a resolution declaring that site to be "the site to erect a grammar school thereon for the Scotland Grammar School." The statute then in force, C. S. U. C. ch. 63, sec. 3, empowered the county council of the county to change the place of holding any grammar school established after the 1st of January, 1854, and applied to the school then in question; and the resolution of the council would probably have had the effect, if the matter had been within the section, of making the designated site obligatory, and making it unlawful to expend money in building on another site, which it was the object of the suit of *Malcolm v. Malcolm* to prevent. The learned Vice-Chancellor expressed his opinion that the county council having power to change the place of holding the school, the trustees had no right to expend the money on the other site. He did not, however, decide the case, so far as the report shews, upon that ground, but said that as the by-law of the council was not mentioned in the bill, the defendants should have an opportunity of shewing by affidavit that they were prejudiced by the omission. Whether advantage was taken of that permission and the effect of the resolution afterwards argued does not appear. It is evident that the reference to the statute must therefore be treated merely as an expression of the opinion entertained at the moment by the Judge, and not as a decision which we can assume to have been within the knowledge of the Legislature, and adopted by it as the received interpretation.

Had the question been argued, it can scarcely be doubted that a different rendering would have been adopted, because the reasons which I have deduced from reading together the three or four consecutive clauses of the Act of 1874, appear more distinctly from the provisions of ch. 63 of the C. S. U. C. Section 1 of that Act declared that there

shall be one or more grammar schools in each county or union of counties, to be distinguished by prefixing to the term county the name of the city, town, or village, within the limits of which it may be situate. Section 2 enacted that the grammar school at the county town should be the senior county grammar school of the county or union of counties; and section 3, that all other grammar schools established on or before 1st January, 1854, should be continued at the places where they were respectively held; manifestly using "place" as equivalent to city, town, or village, and "all other grammar schools" as meaning all those held at any other place, *i.e.*, at any other city, town, or village, than the county town. The antithesis is between county town and other place. These other schools were to be continued at the places where they were held; "but the board of trustees of each of the said schools may change the place of holding such school by a resolution to be passed for that purpose and approved of by the Governor in council; and the place of holding any grammar school established since the 1st of January, 1854, may be changed by the county council of the county within which it is established." The argument for the defendants requires us to hold, not only that this word "place" has a meaning which separates it from the context, but that it was deemed a matter of so grave public consequence whether a school-house stood on one side of the street or on the opposite side, or was moved one door farther to the right or left, that the board of trustees could not safely be entrusted to decide it; and that, in respect of schools established since 1853, although the decision was entrusted to the county council for twenty years, it was thought necessary in 1874 to subject every resolution for such change of site to the scrutiny of the Provincial Executive Council.

We are not compelled either by the reading of the statute or the force of the decision referred to, to act upon a view which seems to me strongly opposed to the spirit of the legislation on the subject of schools.

On these general grounds, and without traversing again the ground so fully explored in *Re Perth*, 39 U. C. R. 34, I am of opinion that the decision appealed from is correct, and ought to be affirmed.

There were, however, some other questions argued before us, and other objections urged to the legality of the proceedings of the board, and the power to make the contract in question. One of these was founded on the circumstance that this is an executory contract to buy land; and it is contended that although the board may have had power to demand and compel payment from the county council of whatever money was required—a power modified by the late Act, 42 Vic. ch. 34, sec. 29, O., which, while it recognizes the right of the board to require the council to raise money for the purchase of a school site, &c., gives the council and the electors a certain control in the matter—yet the power to purchase was limited to expending the money in making an actual purchase, and did not extend to entering into an executory agreement like this one. There seems to be force in this objection, weakened however by sec. 30 of 42 Vic. ch. 34, which declares that the provisions of sec. 29 shall not apply to any case where the trustees of any high or public school corporation, before the passing of that Act, shall have resolved upon incurring any expenditure for any of the purposes mentioned in sec. 29, or when they have entered upon or incurred, or have become liable for any such expenditure—apparently recognizing a power to incur liability in advance of receiving the money demanded from the council. It is only necessary to say with respect to these matters, that they are not raised by the pleadings, and do not properly come before us upon this appeal.

I think this appeal must therefore be dismissed, with costs.

HAGARTY, C. J. Q. B., BURTON and MORRISON, J. J. A., concurred.

Appeal dismissed.

RE BARRETT, AN INSOLVENT.

Insolvent Act, 1875—Power of assignee to avoid chattel mortgage.

Held, affirming the decision of the County Court, BURTON, J.A., dissenting, that the assignee of an insolvent mortgagor can, for the benefit of creditors, impeach a chattel mortgage for non-compliance with the Chattel Mortgage Act.

THIS was an appeal from the judgment of the Judge of the united counties of Stormont, Dundas, and Glengarry, dismissing the petition in insolvency of one Andrew Barrett.

The petitioner claimed, as against the assignee of the insolvent, delivery and possession of goods comprised in a chattel mortgage, given by the insolvent, before the insolvency, to one Edwin Kewin, who transferred all his right to the petitioner. The assignee opposed the petition on the ground that the provisions of the Chattel Mortgage Act (R. S. O. ch. 119,) had not been complied with, by refiling the mortgage within a year, and that the mortgage was in consequence void as against the assignee.

The petitioner appealed, and as the point in issue in this case was the same as that decided by a single Judge of this Court, in *Re Andrews*, 2 App. R. 24, the hearing was before the full Court.

The case was argued on the 29th May, 1880 (*a*).

Bethune, for the appellant. It is submitted that the decision in *Re Andrews* is erroneous. A mortgage void under the Chattel Mortgage Act is good as against the mortgagor, and is good also as against the mortgagor's assignee in insolvency, who under sec. 16 of Insolvent Act, receives the same title that the insolvent had, unless there is an express statutory provision to the contrary. The English Bills of Sale Act makes special reference to the bankrupt's assignee, and avoids the bill of sale in his favour. *Creditors*, in our Chattel

(*a*) *Present*.—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

Mortgage Act, mean *execution* creditors only: *Brown v. Heathco'e*, 2 Atk. 160; *Mitchell v. Winslow*, 2 Story 637; *Gibson v. Warden*, 14 Wall. 248; *Cook v. Tullis*, 18 Wall. 332; *Jerome v. McCarter*, 4 Otto 739; *Goddard v. Weaver*, 1 Woods R. 260. In our own Courts, *Colver v. Shaw*, 19 Gr. 599, and *Re Coleman*, 36 U. C. R. 559, shew the same to be the law here. See also *Re Mapleback*, L. R. 4 Chy. D. at page 156. It was not the intention of the Insolvent Act to introduce any Provincial laws. Full provision is made in secs. 130 to 137 for the assignee impeaching all cases of fraud and preference, and the Provincial Acts, which in each Province are different, and which were not enacted with a view to dealing with the property of insolvents, should not be looked at. The day before the insolvency, the property was in the appellant, as against John Barrett the insolvent. Was there a change the day after? That must be ascertained from the terms of the Insolvent Act itself, which does not say that non-compliance with the Chattel Mortgage Act shall defeat the rights of the mortgagee. Various other portions of the Act shew that the Legislature did not intend the ordinary Provincial Laws to govern unless expressly provided. See sec. 107, which makes provision for set-off; sec. 126, as to marriage contracts in Quebec. See also sec. 127 and sec. 74. Sec. 39 of the Insolvent Act does not bear the Interpretation put upon it in *Re Andrews*. The right there given to the assignee is a right to rescind agreements and deeds made in fraud of creditors, and not for a mere non-compliance with a technical requirement.

Foy, for the respondent. The reasons against the appeal are fully set forth and the point decided in *Re Andrews*, 2 App. R. 24. See also *Doyle v. Lasher*, 16 C. P. 263, where it was held that an *attaching* creditor could take advantage of non-compliance with the Chattel Mortgage Act then in force. *Longeway v. Mitchell*, 17 Gr. 190, decides that a simple contract creditor can, before judgment, set aside a fraudulent deed if he sues on behalf of himself and all other creditors. The fraud in the present case being non-compliance with the Chattel Mortgage Act,

is the same in the eye of the law as an actual fraud. Before the Chattel Mortgage Act, the possession of goods remaining with a mortgagor justified a jury in inferring fraud. Since the Act, and in all cases where the provisions of the Act are not complied with, the inference of fraud becomes absolute: *Chamberlain v. Green*, 20 C. P. at page 307. If, as contended by the appellant, only a judgment creditor could take advantage of the non-compliance with the Chattel Mortgage Act, then the Insolvent Act, instead of accomplishing its intention of securing equal distribution among creditors, would give a preference to the creditor who should proceed to a judgment, and, as an execution creditor, would have the right to take the goods which should properly go to the assignee for the benefit of all the creditors. The Chattel Mortgage Act, though now a Provincial Act, is a re-enactment of a Statute of Canada, passed prior to Confederation, and was in force as a Dominion Act when the Insolvent Act of 1875 was introduced. The Insolvent Act, by expressly giving the assignee certain rights to impeach transactions as fraudulent, cannot exclude him from taking advantage of other frauds that creditors are competent to impeach.

March 27, 1880. BURTON, J.A.—The chattel mortgage, the validity of which is here in question, was clearly void against an execution creditor, or subsequent purchaser, or mortgagee, for want of re-registration.

The point for decision is, whether the assignee in insolvency of the mortgagor, as representing his creditors, is in a position to impeach it.

It is well understood that, apart from express legislative provision, the assignee takes the property of the insolvent with all the burthens and equities to which it was subject, and which are not inconsistent with the principles of the insolvent law. No doubt he, as representing creditors, has rights which the insolvent himself had not, and transactions which were valid as against the insolvent may be impeachable by him, but the question is, whether the right extends to a transaction of this nature,

Under the Chattel Mortgage Act no creditor could take proceedings to impeach a mortgage, by reason of any defect in its registration, until he had obtained execution; as regards all the world, except such a creditor, the instrument was perfectly valid and binding. It is urged on the one hand that the instrument was declared void as to all in the position of creditors, and it was a mere accident that these creditors were unable to enforce their rights until they had obtained execution: that upon insolvency occurring the attachment or assignment, as the case may be, became in effect a statutory execution in favour of all creditors, and gave to the assignee, as representing them, the same rights which could previously only be exercised, by a creditor who had obtained execution. On the other, it is said that the principle I have referred to, viz., that the assignee takes the property subject to the rights of third parties acquired from the insolvent, must be held to have been present to the minds of the Legislature when passing an Act for the equal distribution of insolvent estates. The Bills of Sale Act was not passed for such a purpose, but, wisely or unwisely, gave to an execution creditor priority over a mortgagee, guilty of no fraud, because some informality had occurred in the form or registration of the instrument constituting his security.

If it was intended by the Legislature in the Act of 1864, which is the first Act we have relating to insolvency, to alter the well-known principle of bankruptcy law to which I have referred, and to establish a new code, they would scarcely have declared simply that the effect of the assignment should be to convey and vest in the assignee all the estate, real and personal, which the insolvent had, or might become entitled to before his discharge, with the exception only of such as was exempt from seizure.

The subsequent legislation by the Dominion Parliament, which, under Confederation, has the exclusive power of dealing with bankruptcy and insolvency, is more definite and precise, although in my judgment not essentially different from the previous legislation. What had pre-

viously been understood as depending upon judicial decisions has in these Acts received legislative recognition.

The Parliament of the Dominion was legislating generally for a number of Provinces having different local laws in reference to property, and it would lead to great difficulties if a different interpretation was given to the insolvent law in different localities. To avoid any misapprehension therefore, as it seems to me, the Dominion Act expressly declares that the assignment shall vest in the assignee all the rights, title, and interest, which the insolvent has in or to any real or personal property—*under the same charges and obligations as he was liable to with regard to the same.*

The same Act provides that he may take proceedings to rescind agreements, deeds, and instruments made in fraud of creditors, for the recovery back of money paid in fraud of creditors, and generally may take all proceedings *which a creditor might have taken for the benefit of creditors generally.*

The portions of these provisions which I have italicised were, as I have already remarked, probably unnecessary, as the assignee would have the power which any creditor possessed previously to the insolvency, of impeaching transactions which were fraudulent in law; but I take it that the Legislature, by declaring that deeds which would have been void under the Statute of Elizabeth should be Acts of bankruptcy, and providing in the most ample manner in the frauds and fraudulent preference clauses for the avoidance of all fraudulent deeds and transactions, intended to provide within the four corners of the Act of Parliament for every case likely to arise, and at the same time to declare that every transaction good *inter partes* and not fraudulent in fact, or declared to be void or contrary to the policy of the Insolvent Act, should be protected; and there appears to me to be something significant in the wording of the Dominion Act, in first providing that the property shall pass, subject to the charges made by the insolvent, and then conferring upon the assignee the right

to institute any proceeding which a creditor might institute for the benefit of creditors generally. They have wisely refused to recognize the reputed ownership clauses, productive of so much injustice under the English Bankruptcy Acts, and have, in my judgment, refused to import into the Act and extend the provisions of the Bills of Sale Act.

The Bills of Sale Act has, in the revision of the Statutes and the subsequent legislation, been repealed and re-enacted in the same form by the Local Legislature. If they had in express terms declared that a deed or mortgage unregistered or not registered with such formalities as they might prescribe, should be void as against an assignee in insolvency, and the Dominion Parliament had merely provided that all the estate of the insolvent should pass, I apprehend there could be no question that it would so pass freed from the encumbrance; but how is it where the local legislation passed at a time when there was no insolvency law in existence, has merely declared that such instruments shall be void against creditors, which, by the operation of laws then in force, was confined to execution creditors?

It is one of those difficult questions constantly arising under our constitution.

Each of the Legislatures, that of the Dominion and those of the Provinces, have powers expressly limited by the Act of the Imperial Parliament which created them, and neither can of course do anything beyond the limits which circumscribe their powers, but within those limits each has plenary powers of legislation as large as those of the Imperial Parliament itself.

The difficulty arises when, as here, one Legislature has the exclusive power of dealing with property and civil rights, whilst the other has exclusive powers to deal with bankruptcy and insolvency. This must be looked upon as an exception to the grant of powers to the Local Legislature—in other words, the Local Legislature has exclusive powers to deal with property and civil rights, save in so far as the Dominion Legislature, in virtue of its power to

deal with bankruptcy, may take upon itself to interfere with it.

In the case above supposed the Dominion Parliament might, notwithstanding the local legislation, unquestionably have declared that such instruments, though void as against creditors by that local law, should be valid and effectual as against the assignee, and that such interest only as the insolvent beneficially possessed should pass upon his insolvency.

Here we have no such express declaration by the Local Legislature. The policy of depriving a creditor who has advanced his money *bona fide*, and against whom no charge of fraud is made, of a priority which he would otherwise have by reason of some defect in the registration of his security, and postponing him to another creditor, is one which may admit of considerable discussion, and it may not be unfair to assume that in the language the Dominion Parliament used, they did not intend to extend that right of interference beyond what the Local Legislature had given.

I think, in the very words of the Insolvent Act, the assignee took this property subject to the same *charge and obligation that the insolvent was liable to with regard to the same* : that that charge was a valid charge against every one except a judgment creditor having executions : that the assignee is not such a creditor ; and I see nothing in the insolvent law to confer upon him the rights of a judgment creditor.

Numerous American cases can be found in support of either view. In some of them the laws of the State declared that the assignee took not only all the debtor's property in which he was beneficially interested, but all that could be taken in execution. In others the Supreme Court of the United States felt bound by the construction placed upon the Acts by the Supreme Court of the particular State whose Act was under consideration, whilst Mr. Justice Story, in two cases (*Winsor v. McLellan*, 2 Story 492 ; *Mitchell v. Winslow*, 2 Story C. C. R. 637),

took the view of the law which I am now submitting is the correct one.

I may refer, in conclusion, to the language of James, L.J., in a case in the Court of Appeal in England (*Re Mapleback*, L. R. 4 Ch. D. 150), where it was contended that the transaction was illegal and void as against public policy. "However wrong," he says, "the transaction may have been in law, it was no wrong against the bankrupt law; there was nothing done with intent to delay or defeat creditors, or to defraud any one. * * And except where there is an offence against the bankrupt law, or against some law in favour of creditors, the assignee is merely the legal representative of the debtor, with such right, as he would have had if not bankrupt, and no other."

I think the appeal should be allowed, with costs.

PATTERSON, J.A.—I have very little to add to what I said in *Re Andrews*, 2 App. R. 24, when the same question was before me which is presented in this case.

I then ventured the suggestion that the effect of the argument against the power of the assignee in insolvency to avoid a bill of sale given by the insolvent, for non-compliance with the Chattel Mortgage Act, was that a transaction which a creditor could successfully impeach becomes impregnable and excludes the creditors as soon as insolvency intervenes; a result which seemed to me to furnish a strong presumption against the soundness of the argument. An illustration of the difficulty of reconciling the argument with the policy of the insolvency law itself may be found in what now strikes me as a more correct way of stating the effect of the contention. Instead of the bill of sale or chattel mortgage becoming secure from attack, the result would be that it would remain void as to an execution creditor; and so a creditor who happened to have a *fi. fa.* in the sheriff's hands when the insolvency occurred, or who obtained one at any time afterwards, would, if the assignee could not claim the goods, hold them under his writ and get paid his debt in full, while the other creditors

had to be content to rank on the estate and take such dividends as the other available assets afforded.

There is no hardship done to the insolvent by holding that the goods go to the creditors generally, in place of to the one who happens to get execution. But considerations of hardship are out of place in construing these Acts. In the language of Lord Coleridge, in *Castle v. Downton*, L. R. 5 C. P. D. 56, we may say : "A bill of sale, registered under this Act, enables those who have property to pretend that they have not, and those who have not to pretend that they have. So the parties must comply with the terms of the Act, and if they do not, must take the consequences."

I am not pressed with the difficulty suggested from the circumstance that the Insolvency Act belongs to a legislative jurisdiction different from that whose statute declares the mortgage void as against creditors. Both measures originated in the same jurisdiction, and when the Dominion Parliament substituted the Insolvent Act of 1869, and afterwards that of 1875, for the original Act of 1864, no change was made in the general scheme, so far as the present question is affected.

Section 16 of the Act of 1875 vests in the official assignee generally all assets of any kind or description whatsoever which the insolvent may be possessed of or entitled to up to the time of his obtaining a discharge from his liabilities, under the same charges and obligations as he was liable to with regard to the same. The Act of 1864, in sec. 2, sub-sec. 7, and sec. 3, sub-sec. 22, and the Act of 1868 in secs. 10 and 29, made use of words quite as general, although the reference to charges and obligations appeared, I believe, for the first time in the Act of 1875.

What are the assets of the insolvent must be determined by the laws of the Province where he lives, and in which the jurisdiction exists to legislate as to his property and civil rights within its limits.

When the assignee finds goods in the possession of the insolvent he assumes that they are assets which vest in him under the statute "in trust for the benefit of the insol-

vent and his creditors." If he is met by a claim asserted under a bill of sale or chattel mortgage he must test its validity by the laws of the Province. In this Province he finds the Chattel Mortgage Act declaring that, as against creditors, such a document is invalid, if the statutory requirements have not been observed—in other words, that the goods remain assets for the payment of creditors. They are assets of which an individual creditor could not avail himself until enabled to seize them by legal process, as by *fi. fa.* or attachment, but which the assignee, representing all the creditors, takes under the combined effect of the attachment in insolvency, or the assignment, and the force of section 16 of the statute.

I pointed out in *Re Andrews*, 2 App. R. 24, why I considered that the assignee represented the creditors, and was not clothed under the Act with merely such rights, powers or property as were enjoyed by the insolvent and within his power to convey at Common Law. From the creditor's stand-point the law declares the conveyance void. If void against the creditors, the ownership remains unaffected by it, so far as they or their representative is concerned. The same thing is true apart from the insolvent law. I think a misapprehension of the Chattel Mortgage Act has arisen from the accident that a creditor cannot seize without process of law. He cannot seize any goods of his debtor without process. Yet all the goods of the debtor are assets for the payment of his debts. Goods which the debtor has never attempted to part with, and goods of which he has made a void conveyance, or a conveyance void against creditors, are alike assets to which a creditor may resort, but he cannot reach any of them without execution. Until an execution binds them, the debtor may deal with them as he pleases. He may make a good conveyance in place of the void one, just as he may sell his other goods, the creditor having no lien on either class, and no control over his dealings with either class. This is all that I understand to be meant when it is sometimes said that the statute (which says nothing of execu-

tions) makes the conveyance void only as against execution creditors. It is always void. It always leaves the goods it purports to convey liable to creditors, just as any goods of the debtor are taken to satisfy debts, and by the same process, whether an ordinary execution or the Dominion law respecting insolvency.

If the Bills of Sale Act had expressly named *execution* creditors, it might still have been proper to hold an assignee in insolvency included in the term, on a principle similar to that acted on in holding that the appointment of a receiver in Chancery was an "actual delivery of land in execution by virtue of a writ of *elegit*, or other lawful authority in pursuance of a judgment statute or recognition": *Hatton v. Haywood* L. R. 9 Ch. 229; *Anglo-Italian Bank v. Davies*, L. R. 9 Ch. D. 293; *Ex parte Evans*, L. R. 13 Ch. D. 252.

There is another topic to which I may advert.

It is argued that as the Insolvent Act of 1875 (ss. 130 *et seq.*) declares either void or voidable certain transactions which would be good between the parties to them, an intention is indicated to confine that effect to the cases specifically provided for, which do not include the class covered by the Chattel Mortgage Act.

These sections indicate clearly the policy of the Act, which aims at securing equality in the distribution amongst the creditors of the assets available for their payment. They are directed against frauds either actual or constructive, and against some dealings which are not in either sense fraudulent, by which the equality is likely to be disturbed, as well as against some frauds by which assets are diverted altogether away from the creditors. Their scope and purpose are not the same as those of the local Act. It aims at doing away with the secret conveyances which were once favorite instruments of fraud, and which accomplishes that intent by avoiding the conveyance as against creditors and purchasers, unless it possesses the prescribed requisites of publicity and proof of *bona fides*, without enquiring into its motive or into the reality of the transaction it sets out. When, under this law, the property of

a debtor is declared, in effect, to be still assets liable to his creditors, notwithstanding the secret conveyance, we have a regulation on the subject of property not limited in its application to cases of insolvency, though forming part of the law to which the assignee must resort to ascertain what are the assets which are to vest in him under section 16, and in which the creditors are to share. This view is not interfered with by the presence or the effect of the sections 130, &c.

I think the appeal should be dismissed, with costs.

His Lordship the Chief Justice agrees in the conclusion that the view of the Insolvent Act on which I acted in *Re Andrews*, is correct, and that this appeal should be dismissed. He was prepared to deliver judgment to that effect when he last sat with us to deliver judgments, but the delivery of this one was postponed at that time. He has authorized me to express this as his opinion, as he had not prepared a written judgment. I am further authorized to say that he was a good deal influenced by the judgment given in 1876 by Mr. Justice Strong, one of the Judges of the Supreme Court of the United States, sitting in the United States Circuit Court, in New Jersey, in the case of *Miller v. Jones*, which is reported in the 15th volume of the National Bankruptcy Register, at p. 150. That case presented the same question as this appeal, as our Bills of Sale Act and that of the State of New Jersey are framed in precisely the same terms. The decision upon the particular question was thus expressed by the learned Judge, p. 158: "I think, notwithstanding some decisions to the contrary, an assignee in bankruptcy of the mortgagors stands in the position of such creditors, with equal rights; the adjudication of bankruptcy being equivalent to the recovery of a judgment and a levy—but his rights are no greater." The last expression alluded to the fact in that case that the mortgagee had taken actual possession of the goods, which was held to make good his security against either assignor or execution creditor.

MORRISON, J.A., concurred.

WRIGHT V. THE SUN MUTUAL LIFE INSURANCE COMPANY.

Insurance policy—Want of seal—Estoppel—Departure.

The defendants' Act of Incorporation provided that "all policies shall * * be signed * * and being so signed and countersigned and under the seal of the Company, shall be deemed valid and binding upon them."

The policy sued on was issued by the Company without the corporate seal being affixed, although the attestation clause stated that the Company had thereunto affixed its seal.

Held, affirming the judgment of the C. P. 29 C. P. 221, that the policy was a valid contract to grant an insurance.

Per Moss, C. J. A., the policy supplied internal evidence of a mutual mistake against which a Court of Equity would, if necessary, relieve.

WRIGHT V. THE LONDON LIFE ASSURANCE COMPANY.

This case was similar, except that the statute incorporating the Company provided that "no contract shall be valid unless made under the seal of the Company, and signed * * except the 'interim receipt of the Company.'"

Held, a binding agreement to issue a policy.

Per PATTERSON, J. A., the policy could, if necessary, be construed as an interim receipt.

To the plea of "non est factum," the plaintiff replied on equitable grounds, alleging that the defendants accepted the deceased's application for insurance, and that the policy was issued and acted upon by all parties as a valid policy, but that the seal was inadvertently omitted to be affixed, and claiming that the defendants should be estopped from setting up the absence of the seal or ordered to affix it.

Held, a good replication and not a departure from the declaration.

An agreement to insure may be made by parol.

THESE were appeals from the judgments of the Court of Common Pleas, reported 29 C. P. 221. The facts are sufficiently stated there, and in the judgments of this Court.

In pursuance of the judgments of the Court below, the following equitable replication was filed by the plaintiff:

And the plaintiff for a second replication, on equitable grounds, to the defendants' first plea says, that the said policy was delivered by the defendants to the deceased John Wright, after payment of the premium or reward to the defendants in that behalf, as a policy duly executed and binding upon the defendants, and the said policy was and is signed and countersigned by the proper officers of the

defendants to make the same a valid policy, and as required by the defendants' Act of Incorporation, and nothing was omitted or required to be done by the defendants, or the deceased, to make the said policy valid and binding except the mere affixing thereto of the defendants' corporate seal, and the deceased acted upon the faith of the said policy having been duly executed and binding on the defendants, and the defendants kept and retained the premiums or consideration paid by the deceased for the risk assumed and intended to be undertaken by the defendants under the said policy. And the plaintiff says that she is now entitled to have the said policy made complete and perfect by the affixing thereto by the defendants of their seal, or to have the defendants estopped and debarred from setting up the said defence that the said policy is not their deed, and enjoined against pleading the said first plea as inequitable and a fraud upon the deceased. And the plaintiff prays that the said defendants may be ordered by the Court to affix their corporate seal to the said policy, or that they may be declared to be estopped and debarred from setting up the defence that the said policy was not their deed, and enjoined against pleading the said first plea.

The appeals were argued on the 19th May, 1879 (*a*).

Bethune, Q. C., and *Hoyles*, for the appellants.

Robinson, Q. C., for the respondent.

As the Court held upon the argument that no ground had been shewn for disturbing the finding that the death had been accidental, the argument upon that point is omitted. The argument upon the absence of seals from the policies appears in the re-argument below.

On the 27th of June, 1879, the Court delivered judgment upon the question of the want of seals upon the policies, allowing a new equitable replication to be put in, and the pleadings arising from such equitable replication

(*a*) *Present*—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

to be completed, and directed that either party should be at liberty to give further evidence upon the issues that might arise on such additional pleadings, such evidence to be taken before the Court. The pleadings set out below in the judgment of Mr. Justice Patterson, were then added. Neither side desired to put in any further evidence.

The case was re-argued on the 20th of September, 1879.

Bethune, Q. C., for the appellants. It was admitted by the Court below that there was no evidence of the policies being actually sealed, and they allowed an equitable replication to be added under the A. J. Act, R. S. O. ch. 49, secs. 5-8. No issues, such as these under the amended pleadings, were raised until term, and the Act cannot be intended to allow parties to raise issues of fact after the trial. If this amendment is allowed the result will be that the case will be partly tried by a jury and partly by a Judge, instead of by a Judge alone, as directed by the statute. The replication is a departure. The plaintiff comes into Court relying upon a deed which the defendants deny is their deed, and then she (admitting that the instrument is not a deed) asks to be allowed to invoke the aid of a Court of Equity to have the defendants estopped from denying that the instrument is their deed, or compelled to make it such. Even if these facts had been stated in the declaration the plaintiff could not succeed, as the declaration would be really a bill for specific performance, and could not be entertained by a Common Law Court. The Acts incorporating the companies are imperative in requiring seals, and no Court can dispense with the requirements of the Legislature: *Brice* on *Ultra Vires*, ch. 3, sec. 2; *Frend v. Dennett*, 27 L. J. C. P. 314; *Hunt v. The Wimbledon Local Board of Health*, L. R. 3 C. P. D. 208. Estoppel cannot apply to these cases, as there cannot be a representation by a company except under seal: *Hamilton v. Gore Bank*, 20 Gr. 190.

H. J. Scott, for the respondents. The amendment, if necessary, was properly allowed by the Court below

under sec. 8 A. J. Act, R. S. O., ch. 49. The whole of the actual issues were decided by the jury and the amendment merely gets rid of a technical objection. It is not necessary that when there are legal and equitable issues they should both be tried by a Judge, but only that the equitable issues should be so tried. The replication is not a departure, as it merely set out facts from which the plaintiff alleges that the defendants are estopped from saying that a certain formality—the affixing of a seal—was not complied with. Even if the provision in the statute is imperative, companies are estopped in the same way as individuals: *Herman* on Estoppel, 509–512; *Bigelow*, on Estoppel, 419; *Laird v. Birkenhead R. W. Co.*, 29 L. J. N. S. Chy. 221; *Steevens Hospital v. Dyas*, 15 Ir. Ch. 412; *London and Birmingham R. W. Co. v. Winter*, 1 Cr. & Phi. 63; *Wilson v. West Hartlepool R. W. Co.*, 2 DeG. J. & S. 493; *Law v. Hand in Hand Ins. Co.*, 29 C. P. 1; *Smith v. Mutual Ins. Co. of Clinton*, 27 C. P. 441; *R. & J.s' Digest*, p. 1847. All the requisites of an estoppel as laid down in *Herman*, p. 334, and *Bigelow*, p. 434, exist in these cases. If estoppel does not apply, a Court of Equity would, upon a bill being filed, force the companies to affix their seals, and as a consequent relief order the payment of the amounts due; and such a suit being merely for the purpose of enforcing a money demand can, under the A. J. Act, be brought in a Common Law Court.

March 3rd, 1880. Moss, C.J.A.—Upon the original argument we determined that there was no ground for interfering with the finding that death had been accidental, and we thought it proper to give both parties an opportunity of putting their pleadings in a precise form, and of adducing further evidence. The pleadings accordingly were amended, but neither party desired to offer additional evidence. The controversy, therefore, seems to me to be confined to this narrow compass. The defendants rely upon the want of their corporate seal upon the policy;

the plaintiff replies that this does not defeat her right to recover, because the defendants made a valid contract to insure, and the omission to affix the seal was the result of mistake. It may be that there are other grounds put forward by the plaintiff, which would entitle her to consideration in the eye of a Court of Equity, but these I have mentioned seem to me to be sufficient.

For my own part I think that the policy supplies internal evidence of the occurrence of a mistake against which equity ought to relieve. It purports to be under seal, and it therefore appears to me that the proper conclusion is, that the absence of that formal authentication of the company's contract has arisen from an oversight on the part of its officers. The presumption against fraud prevents us from supposing that there was a deliberate intention not to attach the seal and to state that it was attached. The very form of the instrument leads irresistibly to the inference that the contractor intended to give what the deceased expected to get, a binding contract to pay upon the happening of the event which has occurred. Through a mutual mistake, a formality has not been observed which, it is urged, was essential to the creation of a legal liability. If that proposition be well founded; if the presence of the seal be requisite to create an obligation at law to pay the money, I think it is the appropriate function of Equity to supply the omission, and to frustrate the attempt to make it the means of defeating a claim otherwise unimpeachable. I place no special stress upon the circumstances that the objection of the want of a seal was not urged at the first trial, and that if it had been suggested for the first time in *banc* the Court would not have given the defendants an opportunity of taking the opinion of another jury upon the merits without a waiver of this technical objection; but it certainly supplies an additional reason for not yielding to it except under the pressure of rules of the most rigid description. If any principle can be discovered for exercising jurisdiction on the ground of mistake it ought to be welcomed by the Court.

But it is perhaps more satisfactory to rest the plaintiff's right to succeed upon the broad ground that the instrument in question is, without rectification or alteration, a binding contract to grant an insurance. This seems to me to be perfectly clear. It is an utter fallacy to suppose that the statute incorporating the company expressly prohibited the making of a contract except under seal. It does, indeed, declare that policies signed in a particular manner and sealed, shall be valid, 28 Vic. ch. 43, sec. 19, but it does not restrict the company from binding itself according to the ordinary rules of law. The case of *Perry v. The Newcastle Mutual Ins. Co.*, 8 U. C. R. 363, is a strong authority to shew that even where language of a decidedly restrictive character is used, there may be a valid unsealed contract to effect an insurance. Long before the incorporation of this company it was held, in *Henderson v. Australian Royal Mail Co.*, 5 E. & B. 409, that where the making of a certain description of contracts is necessary and incidental to the purposes for which the corporation was created, such contracts need not be under seal, or, as it was put by Erle, J., the question is, whether the contract is directly connected with the purpose of the incorporation. This, as I understand the *ratio decidendi* in *South of Ireland Colliery Co. v. Waddle*, L. R. 3 C. P. 463, L. R. 4 C. P. 617, proceeds upon the reasonable principle, that the contracts of the authorized agents of a trading corporation acting within the scope of the purposes for which it is incorporated, are as a rule valid and binding though not under seal. The language of the Act cannot fairly be interpreted as exempting the company from all liability except upon a sealed instrument, and certainly the intention to confer so exceptional a privilege ought not to be lightly attributed to the Legislature. It seems to me, therefore, that the document sued upon is, if not in itself sufficient to give a legal right of action, a valid agreement to insure, and to deliver an instrument which is capable of being enforced.

It has been argued that the replication is a departure

from the declaration, and that upon that ground alone the plaintiff's claim ought to be defeated. I think that at this stage of the case, and after the indulgence granted to the defendants, the Court ought, if necessary, to struggle against such an objection. But it does not appear to me that even in the most strictly technical view it is entitled to prevail. The replication is, to put it upon the lowest ground, equivalent to a bill to restrain the assertion of an inequitable defence. Mr. Justice Story has stated the doctrine of the Court to be, that it will interfere to prevent a party from setting up an unconscientious defence at law, or from imposing impediments to the just rights of the other party. He says, in sec. 903, 6th ed.: "In such cases Courts of Equity act by injunction, and by that process prohibit the party from asserting such an unconscientious defence, or from setting up such an impediment to the obstruction of justice. In cases of this sort they act as auxiliary to the administration of justice in other Courts." This view seems to be fully supported by what Lord Redesdale said in *Bond v. Hopkins*, 1 Sch. & L. 430: "Whether this Court will interfere to take from one in favour of another that which would be a defence at law, depends on what is called good conscience. It cannot be doubted what verdict good conscience would here pronounce." There cannot, I think, in this case be any ground for holding that there is a departure. The plaintiff has correctly stated the purport of the instrument. The defendants seek to interpose the objection that it has no seal. The plaintiff replies, "That does not prevent me from recovering, because it is not an objection which in equity and good conscience you can raise."

But bearing in mind the rules prescribed by the Administration of Justice Act, this point seems to be founded upon the narrowest technicality. The plaintiff is not debarred from recovering at law this money demand, even if her right was one which formerly was cognizable only at equity. An amendment of the declaration, or the introduction of another count framed in the manner of a bill,

would remove all difficulty. I do not myself think it necessary, but if the plaintiff desires, there cannot be any objection to putting the pleadings in such a form. Every fact, which can affect the substantial rights of the parties, has been brought forward, and it would be opposed to the whole of our system of jurisprudence to permit the case now to go off upon any nice question of pleading.

In my opinion the plaintiff is entitled to succeed, and the appeal should be dismissed, with costs.

BURTON, PATTERSON, and MORRISON, JJ.A., concurred.

Appeal dismissed.

WRIGHT V. THE LONDON LIFE ASSURANCE COMPANY.

PATTERSON, J. A.—The declaration alleges that, by a policy of accident insurance, dated 8th September, 1875, made by the defendants, signed by the president and attested by the secretary of the company, after stating, &c., and in consideration of the payment of \$7.50 to the defendants, it was declared that the defendants insured John Wright in the principal sum of \$1250.00, for the term of twelve months, ending at noon on 6th September, 1876: the said sum so insured to be paid to the plaintiff, a daughter of the insured, &c. Various provisions of the policy are set out, and it is averred, amongst other things, that John Wright came to his death by an accident, on 7th December, 1875.

There is also a money count.

To the first count nine pleas were pleaded. The first was, that the defendants did not insure, or promise, as alleged. The others attacked the plaintiff's right to recover on various grounds connected with the cause of the death. I do not notice these pleas more particularly. The defendants failed upon them in the Court below, and we have already refused to interfere with that result.

To the money count, never indebted is pleaded; and nothing further turns upon it.

The first plea does not, in terms, traverse any allegation of the count, as the count does not directly allege either that the defendants insured Wright, or that they made any promise. It has been treated as a sort of general issue, putting the plaintiff upon proof of a contract of insurance binding upon the defendants, and we have now to deal with it as having that effect.

There was an eleventh plea, relying upon an alleged misstatement of the age of the insured. It requires no further notice.

Issue was joined on all the pleas; and by leave of the Court below, and indeed upon a suggestion made by the Court when giving judgment, a second replication to the first plea was filed.

At the trial of the issues originally on the record, a verdict had been rendered for the plaintiff.

The Court of Common Pleas, though of opinion that the plaintiff failed upon the general issue, considered that facts might be set out in a replication which would entitle her to succeed; and therefore discharged the rule *nisi* for a new trial, directing the pleadings to be amended by filing the replication.

The contest under the issues in fact related chiefly, if not altogether, to the cause of the death of the insured. There were two trials. The first was before myself and a jury. No question was raised at that trial as to the sufficiency of the policy. It was first objected to at the second trial, which took place before Mr. Justice Armour and a jury. On both occasions the plaintiff had a verdict.

The contest respecting the cause and manner of John Wright's death was a fair and legitimate one, and was entered into by the defendants under circumstances which made it proper that it should be submitted to a full investigation by the appropriate tribunal. But having been decided in the plaintiff's favour, and there being no ground in our opinion for differing from the Court below as to the propriety of leaving the verdict upon it undisturbed, it must now be submitted to, and the discussion is confined

to the question of the existence of a contract valid either at law or in equity.

When the case came before this Court in June last, the record was incomplete, because, although the replication had been filed, no issue either in law or in fact had been taken upon it. We directed the pleadings to be adjusted, and intimated that we would dispose of the issues raised, hearing evidence if necessary; and we gave leave to make further amendments as the parties might be advised.

Thereupon the plaintiff filed an amended second replication, on equitable grounds, alleging that John Wright made an application to the duly authorized agent of the defendants for an insurance of \$1,250: that the application was delivered by the agent to the defendants: that they accepted the application and risk, and communicated their acceptance to Wright: that the defendants and Wright intended to complete the contract by the issue of a policy to the defendants: that, for the purpose of completing it, the defendants prepared the policy declared on, which was prepared in the ordinary course of the business of the defendants, and was attested and signed by the president and secretary, being the officers authorized to execute policies and contracts, and having the custody of the seal of the company; by which policy it was declared that the defendants had caused the same to be so signed and attested; and delivered the policy: that the said officers omitted inadvertently, and by mistake, to actually affix the seal to the policy, and the defendants delivered the policy to Wright in consideration of the payment of the premium, as a policy duly executed by them and as their deed; and Wright, with the knowledge of the defendants, accepted the policy, acting on the faith of the contract and on the belief that the policy was a duly executed policy of the defendants, and their deed, and paid the premium; and, relying on the insurance, neglected to insure elsewhere, and complied with all the conditions of the policy; and the defendants kept the premium, and never repudiated the making of the policy till after action brought: that

there was nothing to be done by the defendants or Wright to make the contract and policy binding, except the affixing the corporate seal: and she prays to have the defendants compelled to complete the deed, or estopped from setting up that it is incomplete.

To this the defendants, besides joining issue, rejoined, denying that they accepted the risk, or communicated such acceptance, or made any contract for a policy, under their seal or by their interim receipt. They also demurred to the second replication. The plaintiff in turn demurred to the special rejoinder, and appropriate issues were joined.

The case came before us again in September upon these amended pleadings. No further evidence was offered.

The question under the general issue arose from the fact that the policy was not under seal. It did not even profess to be drawn as an instrument requiring a seal. It was on a printed form, and had the attestation: "In witness whereof, the London Life Insurance Company, of London, Ont., has caused these presents to be signed by its president and attested by its secretary, and delivered at the head office, in the city of London and province of Ontario, this," &c.

The statute incorporating the company (37 Vic. ch. 85, O.) has, in the 7th section, this passage, following a statement of the powers of the directors: "But no contract shall be valid unless made under the seal of the company, and signed by the president or vice-president, or one of the directors, and countersigned by the manager, except the 'interim receipt of the company,' which shall be binding upon the company on such conditions as may be thereon printed by direction of the board."

The defendants rely upon this as at once invalidating the policy, and incapacitating the plaintiff from shewing such a contract to insure as equity will enforce, contending that the document is not an interim receipt, and that every contract, even a contract to issue a policy, must be by deed.

This is the substance of the defence which we have to examine.

We must start with a presumption, which it is always the duty of a Court to make, in favour of honesty of purpose and of a design, at the outset at all events, to deal fairly. I desire to regard the matter in the same spirit indicated by the learned Chief Justice in the Court below, when he said, at p. 230: "Having obtained this very special clause from the Legislature, they adopt a printed form of policy omitting all reference to a seal, and, as it were, expressly directing and adopting an insufficient form of execution. We are most unwilling to assume that this is done advisedly, and prefer hoping it was merely a negligent omission and mistake." It must be confessed that there is a degree of difficulty in the attempt to reconcile the present defence with strict ideas of morality and right. But "*nemo repente fuit turpissimus*." I prefer to believe that the form of policy was framed without dishonest intent; that even in the formal denial placed upon the record, there was no matured design to dispute the legal contract; that at the trial, which took place before myself, the scheme, if it had begun to germinate, had not yet budded forth so far as to make itself visible; and that it was not until after the new trial had been granted, and perhaps under the forcing influences of the apprehension that the other defence, which was an honest and legitimate one, would fail, the full blossom expanded and diffused its unsavoury fragrance round the stem that bore it.

The success of such a defence must leave a stigma upon those concerned in conducting the affairs of this company, which may, perhaps, be averted by a careful reading of the statute, assisted by the presumption in favour of honesty.

Let us bear in mind the state of the law respecting the capacity of trading corporations to make contracts at the time the defendants obtained their Act of incorporation.

By the effect of a series of decisions the ancient rule, which denied the power to contract without the corporate seal, had become relaxed to such an extent as to leave but little practical difference, in this respect, between a trading

corporation and an unincorporated company. It will not be necessary for me to notice these decisions in detail, because we have, in the judgment delivered by Bovill, C. J., in *South of Ireland Colliery Co. v. Waddle*, L. R. 3 C. P. 463, both an instructive reference to the cases and an admirable summary of the law as settled by them. I therefore content myself with quoting from that judgment, at p. 469.

“Originally, all contracts by corporations were required to be under seal. From time to time certain exceptions were introduced, but these, for a long time, had reference only to matters of trifling importance and frequent occurrence, such as the hiring of servants and the like. But, in progress of time as new descriptions of corporations came into existence, the Courts came to consider whether these exceptions ought not to be extended in the case of corporations created for trading and other purposes. At first there was considerable conflict; and it is impossible to reconcile all the decisions on the subject. But it seems to me that the exceptions created by the recent cases are now too firmly established to be questioned by the earlier decisions, which, if inconsistent with them, must, I think, be held not to be law. These exceptions apply to all contracts by trading corporations entered into for the purposes for which they are incorporated. A company can only carry on business by its agents,—managers and others; and if the contracts made by these persons are contracts which relate to objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts, they are valid and binding on the company, though not under seal. It has been urged that the exceptions to the general rule are still limited to matters of frequent occurrence and small importance. The authorities, however do not sustain that argument. It never can be that one rule is to obtain in the case of a contract for £50 or £100, and another in the case of a contract for £50,000 or £100,000. I will, in the first instance, refer to the case of *Henderson v. Australian Royal Mail Steam Navigation Co.*, 5 E. & B. 409, where, though one of the learned Judges

somewhat differed as to the application of the modern rule, yet all affirmed its existence as well as its propriety. Wightman, J., said: 'I adhere to the opinion which I expressed in *Clarke v. Cuckfield Union*, 1 Bail. C. C. 85, "that the general rule that a corporation aggregate cannot contract except by deed, admits of an exception in cases where the making of a certain description of contracts is necessary and incidental to the purposes for which the corporation was created." And after adverting to the ancient rule and to the earlier and more trifling instances of its relaxation, he goes on: 'But, in later times, the decisions have sanctioned a much more extensive relaxation, rendered necessary in consequence of the general establishment of trading corporations. The general result of those cases seems to me to be, that, whenever the contract is made with relation to the purposes of the corporation, it may, if the corporation be a trading one, be enforced, though not under seal.' And Erle, J., agreed, 'on the ground that the contract was made for a purpose directly connected with the object of the corporation, viz.; the carrying on trade.' Further on the same learned Judge says: 'I cannot think that the magnitude or the insignificance of the contract is an element in deciding cases of this sort. No doubt, when the exception originated, it was applied only to small matters, such as the appointment of servants, being all that municipal corporations required. But, as soon as it became extended to trading corporations, it was applied to drawing and accepting bills to any amount; and this shews that insignificance is not an element. Neither, I think, is frequency. The first time a company makes a contract of any kind, that contract must have been unprecedented. The question is, I think, whether the contract, in its nature, is directly connected with the purpose of the incorporation.' And Crompton, J., agreed in the principles laid down by the other two Judges, but seemed to doubt whether it would not have been more proper to decide in conformity with some of the earlier cases in the Exchequer. But he says: 'I perfectly agree in the principles laid down by my

brothers; and more especially I concur in that important principle suggested in *Broughton v. Manchester Water Works Co.*, 3 B. & Ald. 1, that a modern incorporation, incorporated for trading purposes, may make binding contracts, in furtherance of the purposes of the corporation, without using their seal.' Lord Campbell was not present when that case was decided, but in the following year, reference being made to it in a case of *Reuter v. Electric Telegraph Co.*, 6 E. & B. 341, his lordship said: 'I was not a party to that judgment, but I highly approved of it. The decision in it must, at all events, be binding on us.' But in *Australian R. M. Steam Navigation Co. v. Marzetti*, 11 Ex. 228—a case which occurred a few days after the case first mentioned—the rule I have referred to was unanimously adopted. 'It is now perfectly established,' said Pollock, C. B., 'by a series of authorities, that a corporation may, with respect to those matters for which they are expressly created, deal without seal. This principle is founded on justice and public convenience, and is in accordance with common sense.' And Martin, B., said: "The case of *Fishmongers Company v. Robertson*, 5 M. & G. 131, is precisely in point; and, if it were not, good sense would lead us to the same conclusion.' These principles are now too firmly settled to be shaken. The case of *London Dock Co. v. Sinnott*, 8 E. & B. 347, is distinguishable on the ground which was alleged and adopted by the Court, viz., that it was not a contract of a mercantile character; it was not a contract for work to be done by the defendant for the company, but a contract to enter into another contract. At all events, if it is not distinguishable, it is contrary to the other cases, and it certainly was not intended to throw any doubt upon them."

When the case of *South of Ireland Colliery Co. v. Waddle* came before the Court of Exchequer Chamber (L. R. 4 C. P. 617) Cockburn, C. J., giving the judgment of the Court, said: "We are asked to overrule a long series of decisions in all the Courts, which, in accordance with sound sense, have held that the old rule as to corporations contracting

only under seal does not apply to corporations or companies constituted for the purpose of trading, and we are invited to re-introduce a relic of barbarous antiquity. We are all of opinion that the judgment of the Court of Common Pleas ought to be affirmed. It is unnecessary to say more than that we entirely concur in the reasoning and authority of the cases referred to in the judgment of Bovill, C. J., which seems to us to exhaust the subject."

The rule, thus firmly established in England, had, at a considerably earlier date, been adopted and acted upon in the Courts of the United States.

Among ourselves it was recognized in the cases, amongst others, of *Perry v. Newcastle Mutual Fire Ins. Co.*, 8 U. C. R. 363; *Pim v. Municipal Council of Ontario*, 9 C. P. 304; *Brown v. Corporation of Peterborough*, 30 U. C. R. 373, though perhaps less clearly enunciated than in the English and American cases.

In *Jones v. Provincial. Ins Co.*, 16 U. C. R. 477, the Court of Queen's Bench refused to enforce an interim receipt not under seal; a decision which perhaps might have been different if the cases of *Copper Miners Co. v. Fox*, 16 Q. B., 299; *Henderson v. Australian Royal Mail Steam Nav. Co.*, 5 E. & E. 409, and *Australian Royal Mail Steam Nav. Co. v. Marzetti*, 11 Ex. 228, had been cited to the Court.

The company which is defendant in this action was incorporated in 1874, some years later than the date of any of the decisions I have mentioned. There was, therefore, at that time nothing in the general law of the land to prevent a company, incorporated for the express purpose of carrying on the business of insurance, being bound by a policy issued by its board of directors, or other duly constituted managing body, or authorized agent, without the corporate seal; and even though there may have remained with the Courts of Common Law a reluctance to enforce a contract not evidenced by deed, the Court of Chancery did not hesitate to recognize an unsealed agreement as binding upon an insurance company, and, in a proper case, to com-

pel the execution of a policy which would be deemed valid at law : *Patterson v. Royal Ins. Co.*, 14 Gr. 169.

It has happened that for many years our Legislatures have been accustomed to pass Acts of incorporation, at the instance of promoters of companies, without always being careful to adhere to well considered legal principles in the bestowal of powers or creation of liabilities, or even to maintain uniformity amongst the companies themselves. The consequence is, that we are surrounded with corporate bodies—I allude more particularly to insurance companies—varying from one another in the incidents or formalities prescribed as requisite to a valid contract, and making the attempt to deal with them a matter of uncertainty and risk.

It is easy to perceive that for the security of the companies themselves, as well as of those dealing with them, it may be wise to require that important documents shall bear the guarantee of care and deliberation afforded by the signatures of certain designated officials; but one does not readily see that any security or efficacy can arise from the presence of a seal, unless it has to be affixed by some specified officer, or in the presence of a board of directors, or as the final act in the completion of a deed, or in some way which shall import in reality, and not by mere historical fiction, deliberation and solemnity. Yet, as far as I have noticed, the statutes treat the seal itself as the important requisite, as if it possessed some talismanic virtue, without reference to the circumstances under which, or the person by whom, it is affixed.

Looking over the statutes, as far back only as the Confederation of 1867, we find many insurance companies incorporated, both by the Parliament of the Dominion and Legislature of Ontario. Some of these Acts of incorporation contain no direction respecting the mode of making or authenticating contracts, sensibly leaving the general law of the land to govern. Some are satisfied with, requiring the signatures of president and secretary or other officers; and some, in addition to the signatures,

require a seal. When a seal is mentioned, the demand for it is, as a rule, confined in terms to policies and contracts of insurance *eo nomine*. The only exceptions to this rule which I have noticed are two, and they both occur in our local legislation. One of them I take to have arisen from inadvertence or want of thought in the compiler of the Act 37 Vic. ch. 87, O., which incorporated the Mercantile Fire Ins. Co. He evidently took for his model the charter of The Queen City Fire Ins. Co., 34 Vic. ch. 73; but he improved upon the original. The Queen City's Act required, sec. 18, that "all policies, deeds, *cheques*, mortgages, leases, bonds, and other *instruments*," should be signed by the president, &c. That of the Mercantile, sec. 19, followed that direction *verbatim*, only substituting the word "investments" for "instruments," and went on to declare that these specified documents "being so signed and countersigned, *and sealed with the corporate seal* of the company, shall be binding upon the company according to the tenor and effect thereof."

The other exception consists of a class of three acts, which includes that of the London Company, whose case we are considering. The first of the three was 35 Vic. ch. 87, passed in 1872 to incorporate the Toronto Life Assurance Company. The other two were passed in 1874; the earlier one, 37 Vic. ch. 85, incorporated the London Company, and was, *mutatis mutandis*, a copy of the Toronto Company's Act; and the other, 38 Vic. ch. 66, merely repeated the same Act, incorporating for the purpose of fire and marine insurance, under the name of the Alliance Insurance Company, the same persons who had been incorporated in 1872 as the Toronto Life Assurance Co.

These Acts differ in two particulars from any of the others which I have looked at, viz., in the frame of the provision itself, and in the way in which it is introduced into the Act. It does not form a separate clause, or a portion of one upon any cognate subject; but is in the centre of a long section which is otherwise devoted to the powers and duties of the board of directors, where it is so well

concealed as to make it hard to believe that the directors who issued the policy before us knew of its existence, because it is impossible to believe that they knew it was there, and yet acted honestly in issuing such policies as this, if they understood it to mean what the company now contends.

It is not, perhaps, fair to infer, from the requirement of a seal in some of these private Acts, that our Legislatures disapproved of the rule established by the decisions of the Courts; because such Acts are to be regarded as expressing the desire of the private parties, to which the Legislature has consented to give effect, rather than as indicating the policy of the Legislature itself.

But the Legislature of Ontario has, in at least one recent public Act, included a similar provision, and that in re-enacting, with amendments, an old statute in which it was not contained. The Act respecting Mutual Insurance Companies, 6 Wm. IV. ch. 18, sec. 17, and C. S. U. C. ch. 52, sec. 27, required policies to be signed by the president, and countersigned by the secretary; and declared that, being so signed and countersigned, but not otherwise, they should bind the company—saying nothing of a seal. The Act 36 Vic., ch. 44, sec. 36, O., which took the place of the other, gives binding effect to policies “issued by the board of directors, *sealed with the seal* of the company, signed by the president, and countersigned by the secretary.”

But notwithstanding the appearance of retrogression, in thus insisting upon a seal as one of the formalities in the execution of a policy under the Mutual Insurance Act, I do not think we should be warranted in attributing to the Legislature any disapproval of the doctrines laid down in the authorities I have cited, as applicable to trading corporations generally. And in whatever way this may strike different minds, there clearly is no ground whatever for suggesting that the jurisdiction of the Court of Chancery had undergone any restriction, or that it was not fully known to and recognized by the Legislature as part of the jurisprudence of the country, when the Act respecting

Mutual Insurance Companies and also the defendants' Act of incorporation were passed.

When the Legislature accedes to the request of individual adventurers to grant them corporate powers, and there is nothing to indicate a reason for according to them privileges or protection different from those which are enjoyed under the general law, the object and intention should be taken to be merely to confer the facilities for carrying on business, and the personal immunities which are derived from the corporate existence, leaving the legal rights, powers, and liabilities of the corporation, to follow the rules of law as they apply to the community generally. If any exceptional position is claimed by a company, as having been accorded by the Legislature, it is necessary to shew a clear statutory grant of it.

The defendants insist, that not only are they free from liability on the policy before us, because no seal has been affixed to it, contrary to the doctrines now so universally established and settled, but that even the jurisdiction of Chancery to compel the execution of a policy is excluded, unless a contract under the corporate seal can be shewn.

The high ground thus contended for must not be conceded without a careful examination of the basis on which it is claimed, as we cannot assume *a priori* any intention on the part of the Legislature to create for this corporation a position so very exceptional, and so capable of being used to the injury, in place of the advantage, of the public.

The whole passage to be construed is in these words: "But no contract shall be valid unless made under the seal, &c., except 'the interim receipt of the company,' which shall be binding upon the company on such conditions as may be thereon printed by direction of the board."

We are asked to give to the word "contract" its literal and unrestricted force, which will necessarily cover a policy or contract of insurance, but will also include every such petty transaction as the hiring of clerks or servants, and not merely petty and every day engagements, but everything which can be technically said to "sound in contract."

When we consider that, in the practical business of life, a formal contract like a policy of insurance, or an agreement to build a house according to plans and specifications, is rather the exception than the rule, and that contracts are more frequently made by an offer on one side and acceptance on the other; and more particularly when we bear in mind the general use in business of the telegraph as well as the post-office, the absolutely impracticable character of what the literal reading requires, becomes very apparent. To carry on business under such a constitution would be a simple impossibility; and to hold that such a rule was enacted in the statute, and yet that the violation of it in all the daily concerns of the business was to be winked at, would be a suggestion not to be entertained either by a legislative or judicial Court.

Still we have to construe the statute as we find it, but we must do so in view of the cardinal rule, which is an application of the maxim *verba chartarum fortius contra proferentem accipiuntur*, that when a private act is capable of more than one construction, that one is to be adopted which is most favourable to the public.

The phraseology of the short passage we are considering is chargeable with want of definiteness, not only in using the word "contract" without express limitation, but also in its employment of the term, "the interim receipt of the company," which is ornamented with quotation marks as if it should be recognised as denoting some well-known thing. There is really no reason, capable of being precisely stated, why we should judicially attribute any definite meaning to the expression. By its own force it does not import a contract at all. If we were to interpret it merely by what light the statute gives, we should be warranted in concluding, from the connection in which we find it, that it denoted a contract of some kind made by this insurance company, probably a contract of insurance; and as the section in which the passage is embedded is occupied with the business of the directors, the reasonable inference would be that the receipt evidenced a contract

made by the directors, which construction would be enforced by the expression itself, "the interim receipt of the company," and the reference to the conditions printed on it by order of the directors. We should thus have the statute declaring that there was one kind of contract of insurance which would bind the company without the seal; and finding before us a policy issued by the directors, with numerous conditions printed upon it, but without seal, it would be our duty, *ut res magis valeat quam pereat*, to treat this as the contract so authorized by the name of "the interim receipt of the company."

It may, however, be justly urged that the term "interim receipt" is one in common use, and having a signification in popular acceptance, which ought to be ascribed to it here, namely, a document furnished by insurance companies to their agents who take applications for insurance, containing a receipt for the premium paid to the agent, and a contract insuring the applicant for a limited time, or until something further shall be done. We may adopt this as the meaning, and discuss the construction on the broader basis thus afforded.

It is impossible to believe that the Legislature can have intended or consented to create in the case of this company a state of things so anomalous, so inconvenient, and so fraught with the means of deception and fraud, as that which would result from the literal and unrestricted rendering of the word "contract" on which the defendants rely. It is keeping sufficiently far behind the advance of modern law to require an insurance company to seal its policies; but to make a seal and other formalities essential in all matters which take the technical form of contracts, and, as a consequence of the impossibility of so conducting its affairs, to enable a company to repudiate those common and every day engagements on the faith of which the poorer classes of the community depend for their living, would be a feat of legislation not to be credited while any escape from belief in it was possible.

I think we may find a way of escape in a reading of the

clause which is not opposed to any sound canon of interpretation, while it is consistent with the principles to which I have adverted as applicable to the construction of a private act, and which places this Act on the same footing as others of its class.

There are two parts or members of the sentence we are considering, viz.: the very general enactment, "No contract shall be valid," &c., and the restrictive exception of the interim receipt.

We may find in this exception a key to the intention of the Legislature, and a limitation of the extent of the general term.

The practical impossibility of carrying on business if the seal of the company were required to every kind of contract, is recognized by the declaration that one contract, which is usually made away from the head office, shall be binding without it. To have relaxed in this way, in favour of the interim insurance, a rule which was intended to apply to contracts of less importance and of perhaps even greater frequency, and matters almost of routine, would exhibit a degree of caprice impossible to understand or to credit. It is evident, therefore, and is shewn by this exception in favour of the interim contract of insurance, that the contract dealt with and understood, and intended to be dealt with, is a contract of insurance only.

We may therefore read the clause as declaring that *no contract of insurance* shall be valid without seal except an interim receipt. By the same rule, *contract of insurance* must be taken as synonymous with *policy*, and the whole passage interpreted as enacting that while the company shall be bound *ad interim* by an agent's receipt, its policies must be sealed, signed, and countersigned as directed.

An interim receipt is not an agreement for a policy. It is a contract of insurance for a limited time, or till some further act is done; but whatever are its terms in this respect, it effects an immediate insurance.

Thus the clause deals with the instrument evidencing a completed insurance—the receipt, which effects it *ad*

interim, and the policy, which is the formal evidence of the final undertaking. It declares that the policy must have a seal, although the receipt will bind without one.

It does not prescribe or impose any restrictions upon the mode in which an agreement to give an interim receipt, or to issue a policy, may be made. It is analogous in this respect to our old Mutual Insurance Act, 6 Wm. IV. c. 18, which was construed in *Perry v. Newcastle Mutual Ins. Co.*, 8 U. C. R. 363, as imposing no restriction on the power of the company to bind itself to issue a valid policy by accepting the risk and receiving the premium, although it made the validity of the policy depend on its being executed in the manner prescribed by the statute.

We have something of the same sort in the English Statute, 8 & 9 Vic. c. 106, s. 3, which enacts that a lease required by law to be in writing shall be void at law unless made by deed (R. S. O. c. 98, s. 4). An instrument which would, before the passing of the statute, have been construed as a present demise, but which, being without seal, could not operate as a lease under the statute, will now be construed to be an agreement for a lease, which the statute does not require to be by deed, *ut res magis valeat quam pereat*: *Bond v. Rosling*, 1 B. & S. 371; *Rollason v. Leon*, 7 H. & N. 73; *Tidey v. Mollett*, 16 C. B. N. S. 298.

We have the most conclusive evidence of the agreement of the directors to insure the deceased. They accepted his application; took his money; and gave him the so-called policy in evidence of their bargain. The inference that they agreed on behalf of the company to give him whatever evidence of the insurance was necessary to make a valid policy cannot be avoided. The document he received is only part of the evidence. We take the whole transaction, and, following the negotiation for the insurance, we come to the moment before this document was written. There was then an agreement that he should be insured, and that he should receive a valid policy. It is not necessary to find that the directors meant to give him a valid policy. They may, so far as the argument is concerned, have always had it in their minds to deceive him; but they did not tell

him that. The proper and necessary inference of fact is, that they gave him to understand that in consideration of the money he had paid he was to be insured by a binding instrument. The document given to him is evidence of this—not evidence of an agreement to give him that document; that was not the object of the negotiation—but evidence of an agreement to give him a valid policy; and as soon as the contention that that agreement must be under seal is displaced, as it is by the reading of the statute which I have now been maintaining, the difficulties in the plaintiff's way disappear.

In my opinion we may properly hold, that upon the construction of the statute most consonant to the intention of the Legislature, most in accordance with the true principles applicable to the construction of private Acts of Parliament, most in accord with the policy of the law and with the rules which govern the contracts of trading corporations, and the construction adopted by the managers of this company, or put forth by them as the rule under which the company acted, the company made, if not a valid and binding policy, at least an agreement to issue such a policy, which was enforceable either by specific performance in equity or by action at law for non-performance.

The only question which remains is, the proper disposition of the case upon the pleadings. The rejoinder which is demurred to, and which answers the averment of the replication that there was an agreement to insure, by denying that there was such an agreement effected either by deed or interim receipt, must be held bad in law, as such an agreement may, on our construction of the statute, be made by parol. The replication must, on the same grounds, be held good in law, so far as it relies on such an agreement. The objection to it, as a departure, I shall notice again. Its material allegations are proved in fact. The application, the acceptance, and the communication of the acceptance to Wright, are beyond question. The intention to complete the contract by the issue of a policy, and the issue of the instrument declared on for the purpose of completing the contract, cannot be denied. The delivery of

it to Wright, in consideration of the premium paid, and as a policy, are established. The allegation that the omission of a seal was inadvertent may not be literally true, if it is understood to assert that the officers who issued this paper had intended to affix a seal to it and inadvertently let it leave the office without one. But we must be bound to hold that, while the statute required policies to be sealed, the issue of a policy without a seal was an inadvertence arising from oversight of the requirement of the statute, unless we have conclusive evidence that it was done in intentional neglect of the statutory rule. No one has said this, and no one would be bold enough to say it. There is, therefore, no reason why the prayer with which the replication concludes should not be granted in the alternative which asks that the defendants may be compelled to complete the deed by the addition of their seal. Indeed this has only been resisted, as it is but fair to say, on the ground that no parol contract to issue a policy was valid. The decision of that question adversely to the defendants' contention makes the decree to complete the deed almost a matter of course. This disposes of the objection on the ground of departure, as the declaration is supported by the decree, and the plaintiff will recover upon the contract declared on, as a contract valid at law, if the seal is actually affixed. There is no objection, however, to treating the matter in one of two other ways.

Under the Administration of Justice Act the plaintiff may succeed in enforcing a claim such as the present, which is a money demand, by proving an equitable right to what he seeks, notwithstanding that he advanced it in his declaration as a legal right; and as a Court of Equity, in a case for specific performance of a contract to issue a policy, will make a decree for the payment of the money in place of ordering the issue of a policy merely that it may be sued on at law, the plaintiff may have a decree for the payment of the money she claims. Or the defendants may be enjoined against setting up the non-fulfilment of their duty to affix the seal to the policy which they issued.

In whatever way it is worked out the result is the same,

and entitles the plaintiff to have this appeal dismissed, with costs.

MOSS, C.J.A.—I am also of opinion that this appeal should be dismissed. In arriving at this conclusion I have not deemed it necessary to enter into a minute criticism of section 7. While I have been unable to see my way clear to recognizing the unsealed instrument declared upon as falling within the description of an “interim receipt,” I think it is evidence of an agreement to affect an insurance, which a Court of Equity would under the circumstances enforce. The principles to which I referred in the *Sun* case appear to me to be applicable and sufficient to support a claim to equitable relief. If that be the correct view the A. J. Act entitles the plaintiff to maintain an action in a Court of law, and her right to succeed is established.

BURTON, J. A., concurred with MOSS, C.J.A.

MORRISON, J. A.—I concur in the result that my brother Patterson has arrived at; but I wish to guard myself against agreeing that the unsealed policy or instrument in question could be treated as as an interim receipt, as I think otherwise. I agree in the judgment of the learned Chief Justice, and that both appeals should be dismissed.

Appeal dismissed.

THE CANADA FIRE AND MARINE INSURANCE COMPANY V.
THE WESTERN ASSURANCE COMPANY.

Marine Insurance—Re-insurance.

One B., who was the agent at Montreal, of the plaintiff and defendant Companies, accepted a risk on a vessel of \$7,700 for the defendants, but as the limit prescribed by them on any one vessel was \$5,000 he had to reinsure for \$2,700, and he immediately directed his clerk to write a memorandum of application and acceptance in the books of the plaintiffs for a reinsurance of \$2,700 which was done; but the clerk whose duty it was to endorse the particulars on the open policy issued by the plaintiffs, prepare the certificate, and report the transaction in the daily return, unintentionally omitted to do so, and no notice of the reinsurance was given to the plaintiffs, until after the loss occurred. After they had paid the loss, the plaintiffs discovered the irregularity, and filed a bill to recover the money as paid under a mistake of fact.

Held, affirming the decree of Blake, V. C., that the plaintiffs were not entitled to recover, as the application and acceptance of the risk were, under the circumstances, sufficient to constitute a binding contract of reinsurance.

APPEAL from the decree of Blake, V. C., reported 26 Gr. 264.

The plaintiffs' bill was filed to recover back from the defendants money which they had paid, as alleged, under a mistake of fact.

The claim was simply the common law claim for money received for the use of the plaintiffs.

It appeared that the two companies parties to this suit employed the same persons, Messrs. Simpson & Bethune as their agents in Montreal. A considerable part of the business done by these gentlemen on behalf of the plaintiff company was reinsurance of risks taken by them for the defendant company.

The mode or routine of business to be done for the plaintiffs was explained as follows :

The plaintiffs issued what is called an open policy worded thus :

"By the Canada Fire and Marine Insurance Co., A. R. Bethune, on account of whom it may concern, in case of loss to be paid as interest may appear, do make insurance and cause whom it may concern to be insured, lost or not lost, at and from port to port as endorsed hereon." This had the seal of the company, and was signed by the president and countersigned by the secretary. There was a form of schedule endorsed upon it, in which were inserted the particulars of marine risks, when taken. The ordinary course was to fill in the particulars in this schedule when an application was accepted: and, as the policy was retained by Simpson & Bethune, they gave a certificate to the assured, which was a voucher available in procuring advances on his bill of lading or otherwise; and a daily return was expected to be made to the head office, shewing the transactions.

It did not appear that the duties of the agents in these particulars had been defined by any precise instructions; on the contrary, the managers of the company, who were

not experienced in marine insurance, relied upon their agents, who were experts in the business.

In one particular, at least, viz., the daily return, there was reason given for assuming that rigid punctuality was not observed; but it was said that there was always a full return made at the end of every month.

There were two of the clerks of Simpson & Bethune who had charge in particular of the marine insurance. One of these, Mr. Leslie, was intrusted with the business of the Western Insurance Co., and the other, Mr. Wheatley, with that of the Canada Fire and Marine.

On 3rd October, 1877, Simpson and Bethune took three risks upon cargoes for the Western, viz., one by the *Lorraine*; one by the *Signet*; and one by the *Northumbria*. The last was for \$7,700. The limit prescribed by the Western Company for risks to be held on any one vessel was \$5,000, wherefore it became necessary to reinsure \$2,700. A portion of each of the other risks was also to be reinsured. Mr. Bethune discussed the matter with Mr. Leslie, and it was decided to reinsure the Northumbria cargo with the Canada Fire and Marine to the extent of \$2,700. The other two reinsurances were effected with another company.

At this stage of the transaction the occurrences took place upon which most of the contest in this case turned.

Mr. Leslie filled up an application from the Western Company to the Canada Fire and Marine Company for the insurance of the \$2,700, and placed it on the desk of Mr. Wheatley, whose province it was to endorse the particulars on the open policy, prepare the certificate, and report the transaction in the daily return. It happened, however, that he did not see the application and so did none of those things. Mr. Leslie made entries in the books used for recording the business done for the Western Company both of the insurance for \$7,700 and the reinsurance of the \$2,700 and duly made the return to that company's head office; but no further thought was given to the completion of the formalities on the part of the Canada Fire and Marine Company until the stranding of the Northum-

bria was reported. That vessel went ashore on Anticosti. News of the accident reached Montreal on the 13th November. Mr. Bethune then discovered the position of the reinsurance with the Canada Fire and Marine Company, and caused a fresh application to be filled up, as of 30th October, to take the place of the original one, which was missing, and a certificate to be issued, also as of the 30th October. No endorsement was made on the policy. It was explained by counsel that so many risks had been endorsed that the schedule was quite filled up, and there was no room for this one. The transaction was included in the return of the 13th November as having been effected on 30th October.

On 14th November a letter was written by Mr. Bethune to the Western Company, mentioning the report that the *Northumbria* was ashore, and the steps he was taking in the matter, and also his hopes that the loss might be only partial. He informed the company also that they had \$7,700 on her, but said nothing of reinsurance. The first communication to the Canada Fire and Marine Company was contained in a letter of 16th November in which, after writing about other business, he added: "I am afraid we are going to sustain a considerable loss by *Northumbria*. She is stranded on Anticosti." A few days afterwards he had an interview with the secretary, when he excused himself for the irregularity of the return, but did not communicate the omission to complete the documents and entries at the proper date. The Canada Fire and Marine Company, without any knowledge of this omission by any of its officers, except the Montreal agents, paid the loss to the Western Company.

The true state of the matter having been afterwards discovered, this bill was filed to compel repayment of the money.

The case was argued on the 21st January, 1880 (*a*).

Blake, Q.C., and *G. Patterson*, for the appellants. There was not, in fact or in law, any contract of insurance bind-

(*a*) *Present*.—MOSS, C.J.A., SPRAGGE, C., PATTERSON, and MORRISON, J.J.A.

ing on the plaintiffs. in respect of the cargo of the lost vessel at the time of the loss, and the money paid by the plaintiffs was so paid on the misrepresentation of Bethune that there was such a contract, and under the mistaken belief produced by such misrepresentation and the execution, after the loss, of the antedated certificate. Bethune could not bind the plaintiffs without writing the risk on the policy provided for that purpose, but it was not so written. If it be held that he had power to bind the plaintiffs without so writing the risk, at any rate he could not bind them without receiving a written application, describing the risk and accepting the same, in writing, on behalf of the plaintiffs, and recording the risk in the book kept in their behalf and advising them of it. If it be adjudged that Bethune could bind the plaintiffs otherwise than as above suggested, at any rate he could not bind them by what was written or said in this case. There was no note or memorandum in any of the plaintiffs' books or elsewhere of the alleged insurance. The entry in the book produced does not at all or sufficiently prove the alleged insurance, or establish the alleged contract. Among the defects and contradictions therein, it appears that the dealing was with regard to the vessel and not with regard to her cargo, which is now alleged to have been the subject of insurance. All that was done by Bethune and Leslie was done by them in their capacity of agents of the defendants, and nothing was actually done by Bethune or any one in his employment in the capacity of agent or officer of the plaintiffs, until after the report of the loss arrived. Even if what was done would have been sufficient to bind the plaintiffs in the ordinary case of the agent being agent for the insurers only, something more is required when the agent is the agent of both insured and insurers, and when all that he actually did may be ascribed to his agency for the insured. They cited *Parsons v. Queen Ins. Co.* 43 U.C.R. 271; *Weeks v. Lightning Ins. Co.*, 7 Ins. L. J. 552; *Fleming v. Hartford, Ins. Co.*, 42 Wis. 616; *Western Assurance Co. v. Provincial Ins. Co.*, 26 Gr. 561; *Bryan v. World*, 4 Ins. L. J. 81.

Bethune, Q. C., and *R. M. Wells*, for the respondents.

The respondents were not guilty of any fraud or misrepresentation in obtaining from the appellants the money sought to be recovered back in this suit. They applied to the appellants for payment of the amount of the reinsurance, which was voluntarily paid; and if the money had not been paid by the appellants, the respondents could have recovered, it from them, as it is clearly established by the evidence that there was a valid contract of reinsurance: *Franklin Ins. Co. v. Colt*, 20 Wall. 560; *Mead v. Davison*, 3 A. & E. 303; *Commercial Ins. Co. v. Union Ins. Co.*, 19 How. 318. It was well known to the appellants that Bethune was the respondents' agent, and that he was in the habit of effecting reinsurances for the respondents in their company. If Bethune was guilty of any default in not signing the certificate it was in his character of agent of the appellants, and not in his capacity of agent of the respondents. But it is submitted that under the open policy which Bethune held from the appellants, he had full power to bind them by the making of the contract of reinsurance. The main question at the hearing of the cause was, whether there was any contract of reinsurance. This depended largely upon the credibility of Bethune, Wheatley, and Leslie; and the learned Vice-Chancellor has believed their statements. Upon their evidence it is clear that the appellants were bound by their contract of reinsurance. They cited *Chambers v. Miller*, 13 C. B. N. S. 125; *Story on Agency*, sec. 300; *Pollard v. Bank of England*, L. R. 6 Q. B. 623; *Marriot v. Hampton*, 2 Smith's L. C. 442; *Ellis v. Albany Fire Ins. Co.*, 50 N. Y. 402; *Carpenter v. Mutual Safety Ins. Co.*, 4 Sand. Chy. 408; *Motteaux v. London Ass. Co.*, 1 Atk. 547.

March 2nd, 1880. Moss, C. J. A.—The conclusions of fact arrived at by the learned Vice-Chancellor relieve this case of its most serious difficulties. It is conceded that they cannot be challenged on this appeal, and therefore we are free from the task of weighing the conflicting evidence.

These findings have swept away the charges of fraud with which the bill is embellished, and have reduced the claim to the compass of an action for money received to the use of the plaintiff. Indeed, it appears that before the Administration of Justice Act the Court of Chancery would have refused to entertain the suit, on the ground that the proper forum was at law. At least that is the conclusion which must be drawn from the decision of the Master of the Rolls, in allowing a demurrer to a bill which sought to recover money alleged to have been paid by mistake under very peculiar circumstances: *Lamb v. Cranfield*, 43 L. J. Ch. 408. It was there unsuccessfully argued that the Court had concurrent jurisdiction, and I am free to confess, that but for the opinion of such a Master of equity jurisprudence, I should have thought that the contention was entitled to prevail. However, the question of forum is now immaterial, and as Lord Justice James pointed out in *Rogers v. Ingham*, L. R. 3 Ch. D. 35, at p. 355, there were no more equities affecting the conscience of the person recovering the money in the Court of Chancery than in the Court of Law, for the action for money had and received proceeded upon equitable considerations.

Now in this suit the only question which it is necessary for us to determine is, whether the plaintiffs paid the money in the mistaken belief of the existence of facts which if they existed would have imposed upon them any liability to pay the money.

The arguments founded upon the plaintiffs' failure to make use of the means of knowledge within their reach, do not seem to me to affect their right to relief. It is only necessary to refer to *Townsend v. Crowdy*, 8 C. B. N. S. 477, as authority for the proposition that the established rule now is that it is not enough to bar the right that the party had the means of learning the truth, if he had chosen to make enquiry, but that the only limitation is that he must not waive all enquiry. There might be much ground for holding that the plaintiffs had waived

enquiry, but I do not propose to examine the evidence upon this point, because I think that the correctness of the decision under review can be supported on other grounds of the clearest and most satisfactory character.

I have already pointed out that taking the view of the law most favourable to the plaintiffs, it is essential to their case that they acted under a mistake as to facts or circumstances which in the absence of mistake would have rendered them liable to pay the money. There are three circumstances which they say were conditions of liability which did not exist. The first is, the want of any endorsement upon the open policy issued to Simpson and Bethune. The second is, that no certificate was issued. The third is, that a return was not made to them promptly, as their instructions to their agents required. The last objection has been most effectively dealt with by the Vice-Chancellor, and it is wholly unnecessary to supplement his remarks.

Indeed, it would be quite sufficient to say that on their own theory they supposed that the reinsurance had been effected on the 30th of October, while it is proved that it was present to their minds, when they paid the defendants' claim, that the agent's return had not been made until the lapse of a fortnight after that date. The objection that no certificate was issued seems to be completely met by the consideration that this was something designed for the benefit of the insured, which he was at liberty to waive it was no more than a convenient mode of authenticating the fact of insurance, and furnishing him with a document which he might, if he wished, use for procuring an advance. This point, also, has been fully disposed of by the learned Vice-Chancellor. To the contention, founded upon the want of an endorsement upon the policy, the answer seems equally decisive. No such point is made in the pleading, or proved in the evidence. It is indeed alleged that by the company's charter it is provided that all policies or contracts of insurance shall be signed by the president, or one of the vice-presidents, and countersigned by the managing

director or secretary, or otherwise as may be directed by the by-laws, rules and regulations of the company, and being so signed and countersigned shall be deemed valid and binding; but this is manifestly a different point, and is expressly introduced with a view to the contention that they could not be bound by a verbal contract or an informal memorandum. It is not alleged that a sealed instrument was necessary to create a liability on the part of the plaintiffs, or that they paid the defendants on the faith of the existence of a contract so indorsed. The evidence of their manager upon this point is decisive. He said, that the ground they took for repudiating the defendants' claim was, that the certificate was signed and filled up after the 30th of October. He emphatically denied that they would have raised this objection, if they had not satisfied themselves that there was no contract in fact made or intended at that date, and that the attempt to fasten them with liability was an afterthought. In view of his statement it is impossible to contend that they were even remotely influenced by a mistaken belief that the ordinary endorsement had been made by their agent upon the open policy.

But strong as I believe this position to be, I think that the defendants can maintain one more impregnable. It appears to me, upon the whole evidence, that there was a valid and binding contract of insurance. There is nothing in their charter which prohibits them from authorizing an agent to effect an insurance in any form that the exigencies or conveniences of business might render expedient. There is nothing in the evidence which, when fairly weighed, leads to the inference that they had the slightest intention of placing any restriction upon the powers of their agent. It seems to me that there is much justification for the observations of the learned Vice-Chancellor that the position of principal and agent were here inverted. It is quite certain that to him they looked for instruction and guidance as to the best mode of transacting their marine business. In that their home-officials had no experience, while with Bethune it was a specialty. The direc-

tions, meagre as they were, which they did give, were not meant for limitations of his authority, but as means of apprising them of the amount and character of the obligations into which he had entered on their behalf. They were well aware that he also represented the defendants, and that it was the practice to give them an interest in the risks which that company had assumed, yet they never gave him any special or extraordinary directions as to the manner in which that particular business was to be done, or those transactions authenticated. They are, therefore, in no better position—I am far from saying that they are in an equally good position—as if the defendants had, through an independent agent, applied to Mr. Bethune, on the 30th October, to effect a reinsurance. I confess that, considering the powers Bethune had actually received and ostensibly enjoyed, it appears to be beyond reasonable doubt that upon the state of facts found by the Vice-Chancellor he would have made the plaintiffs liable to the defendants. The case would have been simply that of an agent of the latter applying to an agent of the former, possessing the plenary powers described in the evidence, to effect a reinsurance, of that application being accepted, of the acceptance being communicated, and of the consideration being given. I mention the latter circumstance because I take it to be indisputable that the plaintiffs had sanctioned and ratified the course of dealing by which the defendants were merely charged with the amount of premium at the time. In fact, a moment's consideration shews that this was the necessary result, during the interval elapsing before his next report, of the double agency of Bethune. A payment from one company to the other by him during that period was a mere matter of book-keeping. I should certainly be amazed, and I think the mercantile community would be startled, if authority could be found for the proposition that under such circumstances the plaintiffs could have repudiated liability because the defendants' agent had not cared to obtain a certificate of reinsurance—a certificate, it will be observed, which would not have been signed by the

president and secretary, but by the latter alone, and with respect to the issue of which it was never intended that the least discretion should be exercised by any representative of the company but Bethune.

I am, therefore, prepared to hold that there was a contract to reinsure binding upon the plaintiffs.

In my opinion the appeal must be dismissed, with costs.

PATTERSON, J. A.—We are not troubled with the duty of deciding some questions of fact, concerning which there is abundant room for difference of opinion upon the testimony given at the hearing, because they were disposed of by the learned Vice-Chancellor, and we are not asked to review his finding.

We have to deal with facts which must be taken to have been proved, and any questions of fact which we have to decide depend upon inferences to be drawn from the facts which are thus established.

It is not quite correct to say that the true state of affairs was known when the bill was filed, because the idea at that time seems to have been that the whole story of the reinsurance had been fabricated by Mr. Bethune after he heard of the loss.

This was a mistake, arising from the exaggerated form in which the information had been given to or apprehended by the secretary, whose evidence leads one to suppose that if he had understood the facts as they have been shown by the witnesses, and found by the Vice-Chancellor, this action might not have been brought.

The contention for the plaintiffs now is, not that nothing was done, but that enough had not been done to create a binding contract; and that, money having been paid under the belief that a binding contract existed, the defendants ought, *ex æquo et bono*, to refund it; as in the case of *Mills v. Guardians of Atterbury Union*, 3 Ex. 590, the plaintiff being liable as surety for the faithful accounting for money received by one person, paid the amount of an alleged default in ignorance that the money had been

received by his principal jointly with another person in co-partnership with him, and was allowed to recover back the money because his contract did not extend to secure the fidelity of the two.

If the facts had been as they were understood on the part of the plaintiffs when the bill was filed, there would have been little doubt of their right to recover. The only question which would have been in that case at all arguable, would have been the power of Mr. Bethune to make insurance upon and as of the 13th of November, when he knew the vessel was ashore, but did not know that she would be lost, if he had assumed to make an original insurance on that day; but that was not what he did or professed to do.

I do not see that even if the defendant company can be said to have received the money, knowing that there was no completed contract, because their agent who represented to them that there was such a contract knew that it had not been regularly effected, the plaintiffs' case would gain any strength from that circumstance. The knowledge of the party receiving the money that he has no right to it is not essential to the maintenance of the action; and, where no fraud is imputed, it does not add to the strength of the plaintiffs' case. But there is here the peculiar circumstance that, the same person being agent for both parties, it would follow that if his knowledge is to be imputed to his principals, the plaintiffs knew the facts as well as the defendants, and so were under no mistake when they paid the money. I do not think the case is one in which any implication of knowledge, from the fact that the agent was fully informed, can be resorted to upon either side.

Under the real state of the facts, as now understood, the plaintiffs have to maintain that they were in no way bound to pay the money, a task much less simple than what they supposed they were undertaking when they filed their bill.

By the statutes incorporating the plaintiff company, both the Ontario Act, 38 Vic. ch. 67, and the Dominion Act, 39

Vic. ch. 51, under which the business is really carried on, it is enacted that "All policies or contracts of insurance issued or entered into by the said company, shall be signed by the president or one of the vice-presidents, and countersigned by the managing director or secretary, or otherwise as may be directed by the by-laws, rules, and regulations of the company, and being so signed and countersigned, shall be deemed valid and binding upon the company, according to the tenor and meaning thereof."

This would have affirmed the validity of the contract, if the risk had been endorsed on the open policy, so far as the technical requisites were concerned. It is obvious that the signatures would have had no real significance as imputing any exercise of judgment or deliberation in the acceptance of the particular risk, which was left entirely to the Montreal agent; neither would the policy have been a voucher in the hands of the assured, who was to receive only a certificate from the agent. Still, the policy would have been a formal contract to which the assured and any one dealing with him on the faith of the certificate would, no doubt, have been entitled to have access, and which would have always furnished evidence to charge the plaintiffs in case of loss.

It does not, however, follow that the plaintiffs can be bound in no other way. The statute does not confine the power to contract to this or any other particular mode. Under the general law of this Province, which, in the absence of evidence to the contrary, we must take to prevail also in Montreal, a trading corporation may become bound in respect of those matters of business which it is incorporated to carry on, by almost any act which will bind an unincorporated partnership. Sufficient authority for this proposition will be found in the judgment delivered by Bovill, C. J., in *South of Ireland Colliery Co. v. Waddle*, L. R. 3 C. P. 463. I may, however, also refer to *Perry v. Newcastle Mutual Fire Ins. Co.*, decided in our own Court of Queen's Bench in 1852, 8 U. C. R. 363. The plaintiff there sued, in an action for money had and received, to

recover back moneys paid as premiums upon a policy which was defective for want of the president's signature. The statute, 6 Wm. IV. c. 18, which regulated local mutual fire insurance companies, declared that any policy, signed by the president and countersigned by the secretary, *but not otherwise*, should be deemed valid and binding on the company. Sir John B. Robinson, in giving judgment against the plaintiff, used this language, p. 369 : "And thirdly, which indeed is conclusive of itself against this action, the plaintiffs cannot be said to have paid their money for nothing, since the company were in fact bound to execute a policy, having accepted the risk and received the money. Their own by-law, as they rightly insisted in answer to this demand, made them clearly liable. It is usual with insurance companies to accept the premium and give a temporary receipt, which binds them in case of a loss happening before the policy is drawn out; and it is necessary that this should be the case, especially in cases like the present of renewed or continued insurance, for otherwise a person might be ruined by a fire in occurring the short interval which must elapse before the formal instrument can be prepared and executed."

The same learned Judge referred, in *Jones v. Provincial Insurance Co.*, 16 U. C. R. 477, to *Angell's* treatise on Fire and Life Insurance, as containing the best discussion of the subject of agreements to insure. A considerable portion of the third chapter of that work is devoted to the consideration of decisions, chiefly of the American Courts, and at sec. 47 the learned author thus summarizes the effect of them : "The doctrine may be, therefore, considered to be well established in this country, that the acceptance of a written proposal for insurance consummates the bargain, provided the offer is standing at the time of the acceptance. What shall constitute an acceptance will depend in a great measure upon circumstances; but it is certain that a mere determination of the mind, or such determination without action, can never be an acceptance. Where the proposition is by letter, the usual mode of

acceptance is by the sending of a letter announcing a consent to accept ; where it is made by a messenger, a determination to accept, returned through him or by another, would seem to be all the law requires, if the contract may be consummated without writing. There are other modes equally conclusive on the parties ; keeping silent, under certain circumstances, is an assent to a proposition ; any thing that shall amount to a manifestation of a formed determination to accept, communicated, or put in the proper way to be communicated to the party making the offer, would doubtless complete the contract ; but a letter written would not be a complete acceptance so long as it remained in the possession or under the control of the writer. An acceptance is the distinct act of one party to the contract, as much as the offer is of the other."

Adopting this, as I think we may fairly do, as a statement of our own law, let us inquire what was actually done. There was the written application by the Western Company to the Canada Fire and Marine. There was the express acceptance of the offer verbally made by Mr. Bethune. It was decided to re-insure this particular risk with the plaintiff company, after a discussion between Mr. Bethune and Mr. Leslie, while the other two risks were given to another company, not because this company was preferred as the safer of the two, but because the risk was considered the best of the three. The selection was made in the interest of the plaintiff company, not in the interest of the defendants. It was thus a good deal like an offer or request from the plaintiffs, acceded to by the defendants. So far therefore as a verbal acceptance by the agent of the plaintiffs could operate to bind the plaintiffs, that fact may be taken as clearly established. On the part of the defendants there was the offer or application, which was thus accepted—there was the communication of the transaction to the head office, in addition to what was itself an effective communication from the very nature of the business as done by the agent ; there was the placing or the attempt to place the accepted application in

the usual course for the preparation of the more formal documents; and there was the payment of the money according to the system in force between the companies.

I think, that setting aside any question as to Mr. Bethune's authority, these acts were sufficient to create a contract to insure, which under the law of this province entitled the defendants to demand a valid policy.

Then as to the agency. It has been urged by Mr. Blake for the plaintiffs, that the mode in which it was intended that their business should be conducted, and to which I have already adverted, being shown, and it being also apparent that the business of the Western Company was conducted on the same system, there should be considered to exist a limitation of the agent's power to bind his principals by business done in that mode only, and that each company should be taken to have had notice that the other had so limited his authority.

It does not strike me that this view can reasonably be taken of the evidence. The plaintiffs could, if they had so desired, have given specific instructions to their agent confining his powers within well defined bounds, and guarded their dealings through him so as to avoid creating a belief in those with whom they did business that his authority was more extensive.

They did nothing of this kind.

The secretary said upon his examination in the cause. "If Mr. Bethune on the 30th of October, had received instructions for the risk and had received money for it, but had not issued the certificate, I should say, that he as agent had power to bind the company for any reasonable time while the certificate was being made out; by a reasonable time, I mean during the same day, but not longer; if the agent delayed for a week to make out the certificate I should say it depended upon the particular circumstances of the case as to whether the company would be bound or not, if the agent was only authorized to receive risks and issue the certificates forthwith on receipt of the premium. We gave the agent instructions only as to the lines which

he was to write, but no instructions as to the time within which he was to issue certificates; we gave our agent no form for receiving applications for marine risks, nor any instructions as to the manner in which he was to receive them; he was authorized to bind our company in marine business without referring to the head office; he was to report each day what risks he had put us on."

Suppose the agent had given a certificate on 30th of October, and had reported the risk in his daily return for that day; and that after the loss, the plaintiffs, upon production of the certificate, and after referring to the daily report, had paid the money, but had subsequently discovered that the risk had not been endorsed upon the policy; could it be reasonably contended that under these circumstances they could have insisted on the money being returned to them? I should say clearly not. Yet there would have been no such legal contract as the statute calls for. The certificate would have stated that there was such a contract, but that would have been untrue. So would the return. But these instruments would have been pretty conclusive evidence of an acceptance of the application, and a communication of that acceptance to the assured—in other words, of an agreement to insure. They would not have been a policy, but they would have proved an agreement upon which the issue of a policy could have been enforced.

The evidence of such an acceptance and agreement before us may be less distinct, but that is a question of degree only. The fact that there was such an acceptance results from the facts found by the Vice-Chancellor.

In my judgment the agent was authorized to bind the company by that acceptance.

I think the plaintiffs have failed in establishing a case for repayment of the money, and that the appeal should be dismissed, with costs.

SPRAGGE, C., and MORRISON, J.A., concurred.

Appeal dismissed.

MOORE V. KAY.

Landlord and tenant—Action for refusing to give possession—Statute of Frauds.

The plaintiff sued defendant for damages for refusing to give him possession of premises which the plaintiff alleged that defendant had verbally agreed to give him a lease of for sixteen months.

Held, affirming the judgment of the County Court, that the evidence did not show an actual letting, but that even if it did the plaintiff must fail under the fourth section of the Statute of Frauds, as the action was brought in respect of an agreement for an interest in land.

APPEAL from the County Court of Waterloo.

The plaintiff sued the defendant for damages for refusing to give him possession of certain premises, which he alleged the defendant had agreed to let to him for sixteen months, at a yearly rent of \$75. The evidence is fully set out in the judgment below.

At the trial the learned Judge nonsuited the plaintiff on the ground that the agreement, not being in writing, was void under the fourth section of the Statute of Frauds.

From this decision the plaintiff appealed.

The case was argued on the 5th March, 1880 (a).

Read, Q. C., and *C. A. Durand*, for the appellant, cited *Bandy v. Cartwright*, 8 Ex. 913; *Hall v. City of London Brewery Co.*, 31 L. J. Q. B. 257; *Lord Bolton v. Tomlin*, 5 A. & E. 856; *Clements v. Martin*, 21 C. P. 512; *Inman v. Stamp*, 1 Starkie 12; *Palmer v. Thornbeck*, 27 C. P. 291; *Coe v. Clay*, 5 Bing. 440; *Jinks v. Edwards*, 11 Ex. 775; *Woodfall on L. & T.* 152, 154.

Kerr, Q. C., for the respondent, cited *Drury v. McNamara*, 5 E. & B. 612; *Edge v. Strafford*, 1 C. & J. 391; *Stubbs v. Broddy*, 27 C. P. 234; *Kyle v. Stocks*, 31 U. C. R. 47; *Mechelen v. Wallace*, 7 A. & E. 49.

The arguments are sufficiently stated in the judgments.

(a) *Present*.—BURTON, PATTERSON, and MORRISON, JJ.A.

March 27th, 1880.—BURTON, J.A.—I am of opinion that the decision of the learned Judge of the County Court was correct, and should be affirmed.

It is not necessary to hold in this case, although that would be my view of the transaction if necessary to decide it, that this is an agreement for a written lease to be executed *in futuro*, and not a present demise, because, assuming it to be the latter, it does not assist the plaintiff in maintaining this action. Until entry he has only an *interesse termini*, and, if driven to bring an action for not delivering possession, which is what is complained of here, he is met by the fourth section of the Statute of Frauds, which provides that no action shall be brought to charge any person upon any contract respecting any interest in lands, unless the agreement shall be in writing.

Coe v. Clay, 5 Bing. 540, cited by Mr. Read, has been referred to sometimes in argument as being an action on an oral agreement: see counsel's remarks *arguendo* in *Drury v. Macnamara*, 5 E. & B. 612; but Lord Campbell, in giving judgment in that case, refers to it as a written instrument.

Edge v. Strafford, 5 E. & B. 395, which is the converse of this case, establishes that though parol leases may be valid, and whatever remedy may be had upon them in their character of leases may be resorted to, they do not confer the right to sue the lessee for damages for not taking possession; neither do they confer upon the lessee a right to sue for not giving possession.

I do not dispute that if the plaintiff had obtained possession under this arrangement, treating it even as an agreement for a future lease, that a tenancy might not have been created upon the terms of the agreement. In *Lord Bolton v. Tomlin*, 5 A. & E. 856, the Court said, p. 864: "Whilst it remained an executory agreement, the performance of it could not be enforced; yet it by no means follows that when an actual demise by parol took place, and which was valid under the second section of the Statute of Frauds, and a tenancy was actually created by entry and payment

of rent, the terms of that tenancy may not be proved by parol."

Upon the evidence, I should think it doubtful if the plaintiff has any remedy; but it is clear that he cannot maintain this action.

The judgment below was, in my opinion, correct; and this appeal should be dismissed, with costs.

PATTERSON, J. A.—The evidence seems to shew that the plaintiff, who occupied premises under a lease from the defendant's mother, bargained with the defendant, who occupied other premises which belonged to his mother, for a lease of the latter premises for sixteen months, possession to be given on the 1st of September, 1879. The rent was to be \$75 a year. It does not appear clearly when the bargain was made. The plaintiff and his brother name the 24th or 25th of August, without speaking with certainty. There is other evidence that it was in July, and I think it quite certain that it was long before the date given by the plaintiff. The premises were to be occupied by machinery, which the plaintiff intended to drive by water power, which he expected to obtain from a Mr. Cowan, and he made preparations for the use of this power by constructing a platform. A witness proved from entries that the plaintiff ordered machinery for the water power in July. Another that the platform was built in July. Others gave evidence of the same character.

It is not shewn by the plaintiff when the rent was to commence. The defendant says it was to be at the 1st of September. It was intended to have a lease in writing. A Mr. Cant was to draw it. It was proposed to write it upon the other lease which the plaintiff had. It does not appear distinctly whether this lease was to be from the defendant or his mother. I should say the latter, because the plaintiff knew the premises belonged to her, and he proves that it was to be according to the terms, and for the same time, as the unexpired term of the lease he had from her, upon which it was to be endorsed; but the point does

not seem to have been talked of in the bargain, and was probably not distinctly thought of. The defendant's right to rent the premises is stated, but not whether in his own name or that of his mother. There is uncertainty also as to the premises. The plaintiff suggests that he was to have some land or yard, as well as the building. The plaintiff's witness Cant, who was familiar with the matter, says it was only the building, and the defendant also says so.

The plaintiff did not ask for possession at the 1st of September, nor till some time in October. He then wanted the lease written and executed, and possession. But circumstances had changed. It had been discovered in August, or early in September, that the water power could not be had. The plaintiff then decided on using steam, and made preparations for that; amongst other things, drilling a well and drawing bricks. One of the things left uncertain is, whether this well was on the premises which were to be let. When the plaintiff at last got his machinery ready, and wanted the lease prepared, the defendant objected to let the building for the use of steam machinery on the same terms as agreed upon when water was to be used. The result was, that the plaintiff got premises elsewhere, and brought this action.

He does not profess to contend for any right to sue on a verbal agreement for a lease. His case is, that what took place created the relation of landlord and tenant between him and the defendant; and that, being tenant of the defendant, he had a right to possession and an action for damages for the refusal to admit him.

The learned Judge of the County Court has held that the action must fail, under the 4th section of the Statute of Frauds, because it is brought in respect of an agreement for an interest in land. I entirely agree with the learned Judge, both in his conclusion and the reasoning by which he has supported it.

Several cases have been cited to us on the part of the appellant to shew that an entry is not necessary to the

vesting of a term of years in the lessee; a proposition abundantly established by the authorities referred to.

Then it is argued that on the principle acted on in *Coe v. Clay*, 5 Bing. 440, and *Jinks v. Edwards*, 11 Ex. 775, he who lets agrees to give possession, and if he fails to do so the lessee may recover damages against him, and is not driven to bring an action of ejectment.

But no authority has been produced for the proposition that an agreement to give possession, whether made in express terms or resulting from a letting, can be enforced in the face of the fourth section of the statute of frauds, unless evidenced by a writing.

Coe v. Clay is quoted as if the letting there had been by parol. I do not know why this is assumed. All we are told in the very short note which is given of the case is, that "the defendant had agreed to let the plaintiff certain premises *per verba de præsenti*; and this was an action for not letting him into possession, which, a preceding occupier having wrongfully refused to quit, the defendant was unable to effect." The defence was, that the agreement amounted to an actual demise, and that the plaintiff should have brought ejectment. The note of the judgment is: "The Court were all clearly of opinion that he who lets agrees to give possession, and not merely to give the chance of a law suit; and the breach assigned, being that the defendant did not give the plaintiff possession, the rule was refused."

In *Drury v. Macnamara*, 5 E. & B. 612, *Coe v. Clay* is cited by counsel as having been upon an oral agreement, but Lord Campbell, C.J., does not seem so to have understood it. He said, "In *Coe v. Clay*, the *instrument* did operate as a lease; that is clearly the foundation of the judgment."

Edge v. Strafford, 1 C. & J. 391, is an express authority against the plaintiff. An action was brought on a verbal letting of lodgings, against the tenant, for refusing to take possession. In giving the judgment of the Court, Bayley, B., said: "Is not the agreement on which this action is

brought, a contract of an interest in lands? The defendant, by the lease, has an *interesse termini* only; the agreement upon which the action is founded is to force him to take an ulterior interest, and clothe himself with the possession. If it be said that the agreement upon which the action is brought is merely a result, by operation of law, from the demise, and that, as that is a valid demise, whatever is a result from it must be valid also, the answer seems to be that the fourth section takes away the right to sue upon this result, and that though the result be not invalid, it cannot be made the foundation of an action. The effect, then, of the statute of frauds, as far as it applies to parol leases not exceeding three years from the making, is this: that the leases are valid, and that whatever remedy can be had upon them, in their character of leases, may be resorted to; but they do not confer the *right* to sue the lessee for damages for not taking possession."

The plaintiff must therefore fail in this action, even if we concede to him that he has shewn an actual letting. But I am satisfied that he has shewn no such thing; that there never was an idea of a tenancy except under a written lease; and that, even as an agreement, the terms shewn by the evidence are too uncertain to be enforced by a decree for a lease. That consideration, however, is out of place here.

The point most strenuously urged for the appellant was that he had been let into possession of a part of the premises, viz., the place where he sunk his well, and another place where he was allowed to put a carriage. I have already remarked that it is not clear that the well was on the premises. The carriage was moved there before 1st September, and was certainly not permitted to be put there as a giving of possession under the agreement. But the plaintiff only raises a dilemma without in any respect avoiding his other difficulties. If the possession has been given he disproves his cause of action. If he has to rely on an agreement to give possession, the fourth section confronts him. Some attempt was made to evade this by

resorting to what I cannot help thinking was a confusion of ideas, which may have led to the bringing of this action. This argument was, that the plaintiff had, in effect, had constructive possession of the whole, and had, in effect, been evicted from the whole; and the eviction, or refusal to permit him to retain possession, was really what was aimed at by the declaration when it complained of a breach of a contract to give possession;—in other words, that this is, in effect, an action of trespass for eviction. This suggestion is so far from bettering matters, that it starts a new difficulty, because the defendant denies that the plaintiff has, or ever had, a term. He directly puts the title in issue, and ousts the jurisdiction of the County Court.

I entertain no doubt of the propriety of dismissing the appeal, with costs.

MORRISON, J. A., concurred.

Appeal dismissed.

CANNON V. THE TORONTO CORN EXCHANGE.

Incorporated society—Arbitration of questions arising between members—Expulsion.

By one of the by-laws of the defendants' association they were empowered to expel any member for refusing to submit a question arising between members to arbitration, but it was provided that such expulsion should take place only after the case should have been submitted to a meeting of the association, due notice having been first given to the parties that such a meeting would be held.

M. & Co., members of the association, had a claim against the plaintiff, who was also a member, consisting of three items \$1.06 for balance of purchase money of grain; \$3.97 for freight on same grain which they had paid under protest, and a sum for costs incurred in an action brought by them to recover back the freight so paid. The plaintiff paid the first item, but disputed the balance of the account, whereupon M. & Co. applied for and obtained a resolution by defendants that there should be an arbitration, to which the plaintiff submitted, and he afterwards admitted his liability for the amount claimed for freight, and offered his note at 12 months for it, which W. & Co. declined. Upon a submission, however, being tendered him covering the three items, he refused to sign it as the first two items were no longer in dispute. In consequence of his refusal, the defendants expelled him at a meeting called "to receive a report from the committee, regarding the conduct of a member."

Held, affirming the decree of Proudfoot, V. C., 27 Gr. 23, that the plaintiff was improperly expelled, and was entitled to be reinstated in his rights of membership.

Per BURTON and PATTERSON, JJ.A., that there had been no refusal to arbitrate within the meaning of the by-law, but only a refusal to arbitrate upon a matter not in dispute.

Per GALT, J., that the notice of the meeting at which the expulsion took place was not a sufficient compliance with the provision which required that the object of the meeting should be specially stated.

THIS was an appeal from a decree of Proudfoot, V.C., declaring that a resolution of the defendants, (an association incorporated by an Act of the Dominion), expelling the plaintiff, who at the time was a member of the association, was invalid and void, and ought to be cancelled.

The facts of the case are fully set forth in the report of the Vice-Chancellor's judgment, 27 Gr. 23, and in the judgments on this appeal.

The case was argued on the 13th March, 1880 (a).

C. Robinson, Q.C., and T. Ferguson, Q.C., for the appellants. The statute 35 Vic., ch. 45 D, incorporating the

(a) *Present*—BURTON, PATTERSON, and MORRISON, JJ.A., and GALT, J.

appellants, gave them power to expel any member for such reasons and in such manner as might be by by-law appointed ; and in expelling the respondent, in accordance with the by-law subsequently passed by them, they were acting within their powers. In cases of this nature the Court merely have to say whether the association has acted within its jurisdiction. The dispute in question then being one which they were empowered to deal with, and the committee of management having decided that the dispute should be arbitrated upon, the respondent's refusal to comply with their decision, which is fully shewn in the evidence, justified the appellants in expelling him. All the requirements of the by-laws were reasonably complied with. The expulsion took place at a full meeting of the association, after due notice had been received by the respondent that such a meeting would be held, and was agreed to by a two-thirds vote of all the members present. It is submitted that the view taken by the learned Vice-Chancellor in respect to the notice required by section 3 of article IV of the by-laws is erroneous, as it appears by the evidence that the respondent had notice of and did attend the meeting of the 18th of June, at which his case and the subject of his expulsion were under consideration, and that, with the respondent's knowledge, this meeting was adjourned to the 25th of the same month ; and on this day, being the day of the expulsion complained of, the respondent attended the adjourned meeting, and defended himself, having in the meantime taken legal advice for the purpose of so doing. The short period allowed him by the meeting to submit to the arbitration, although it might in an ordinary case appear unreasonable, was, under the circumstances of this case, quite sufficient, as the matter had been the subject of much previous consideration and discussion, and no complaint was then made as to the time being too short, and no further time was asked. They cited *Blacksmiths' Society v. Vandyke*, 2 Whar. Penn. 312 ; *The Commonwealth v. Pike Benevolent Society*, 8 Watts & S.,

Penn. 250; *The State ex rel. Graham v. Chamber of Commerce of Milwaukie*, 20 Wis. 63; *The People v. The Board of Trade of Chicago*, 45 Ill. 112; *The People v. The New York Corn Exchange*, 15 Sup. Ct. 216; *The People v. The Board of Trade*, 80 Ill. 134; *Rex v. Richardson*, 1 Bur. 539; *The Society for the Visitation of the Sick v. The Commonwealth*, 52 Penn. 125; *The People v. The Medical Society*, 24 Barb. 575; *Hopkinson v. Lord Exeter*, L. R. 5 Eq. 63; *Wright v. Monarch Investment Building Society*, L. R. 5 Ch. D. 726; *Gardner v. Freemantle*, 19 W. R. 256; *Lyttleton v. Blackburn*, 33 L. T. N. S. 641; *Angell & Ames on Corporations*, secs. 342, 461; *Field on Corporations*, sec. 269.

McMichael, Q. C., and *Boyd*, Q. C., for the respondent. The claim of Weatherston & Co. was a mere money demand, and should have been decided in a Court of Law, as it was not intended by the by-laws that such a matter should be settled by arbitration. The Act of incorporation only contemplated settlement by arbitration of such matters of dispute as should arise between members respecting some usage of trade or business, or the construction of some contract or agreement; and the appellants had no power to expel a member for refusing to arbitrate on a matter not within their jurisdiction. Having admitted his liability for the \$1.06 and the freight, the only matter in dispute was his liability for the costs, which clearly was not a commercial matter. But the respondent, nevertheless, submitted to arbitrate on his liability for these costs, and the appellants had no power to include in the reference (if the matter should have been referred,) any claim other than the one in dispute, for the words of the Act are "misunderstandings or disputes." The committee of arbitration never came to any final decision, for the report of the 11th of June, and the minutes of the meeting of the 18th of June, shew that the respondent only refused to sign the bond in the shape presented by the appellants, and that the committee referred the whole matter back to the association, the effect of which was to leave the matter to be gone into *de novo*

before the whole body. At this time the appellants fully understood what the respondent admitted and disputed, and as a whole body, they took the matter into consideration and under their control and disposition, and, therefore, any conclusion or decision the committee may have come to was waived. The bond of submission submitted by the appellants was not a compliance with section seven of article four of the by-laws, and the respondent was expelled, not because he refused to arbitrate, but because he refused to execute this bond. No sufficient notice was given to the respondent that a meeting would be held at which the question of his expulsion would be decided; and before the meeting of the 25th of June, it had not been decided that the respondent should be expelled, nor was the meeting called for such purpose, nor notice given that it was called for such a purpose. Their duty was to have called another meeting, and to have given due notice thereof, and of the object of such meeting, so as to give not only the respondent but all the members of the association an opportunity to be present and vote upon the question. By-law 3 of Article IV. requires that the president and committee shall come to a decision, and if such decision is not complied with the party refusing shall be expelled. In this case, however, the association as a body took the matter into their own hands, made alterations in the bond, and reconsidered the matter entirely, and it was because the respondent refused to comply with their decision, and not the decision of the president and committee, that he was expelled; and we submit that they had no such power under the by-law. The presence of the respondent at the meeting of the 25th of June was no waiver of the notice, because that meeting was not called for the purpose of expelling him, and as a member of the association he had a right to be present at the meetings thereof, and could not be considered thereby to waive any right to notice he was entitled to. The resolution of the 25th of June was irregular and void, because Mr. Weatherston, who was an interested

party in the matter, voted thereat. They cited *Dean v. Bennett*, L. R. 6 Ch. 489; *Cuthbert v. Commercial Travelers' Association*, 39 U. C. R. 578; *Grenville Murray v. Earl of Clarendon* L. R. 9 Eq. 11; *Re Hayman v. Governors of Rugby School*, L. R. 18 Eq. 28; *Labouchere v. Earl of Wharnccliffe*, 41 L. T. N. S. 638; *Fisher v. Keane*, 41 L. T. N. S. 335, and L. R. 11 Ch. D. 353; *Long v. Bishop of Cape Town*, 1 Moo. P. C. N. S. 411; *Darling v. Brown*, 1 S. C. 360; *Morrison v. Glover*, 4 Ex. 430; *Ravee v. Farmer*, 4 T. R. 146; *Upton v. Upton*, 1 Dowl. 400; *Commonwealth v. German Society*, 15 Penn. 251; *Evans v. Philadelphia Club*, 50 Penn. 107; *Morse on Arbitration*, 504.

March 27, 1880. BURTON, J. A.—One of the objects of the respondents' association was declared, by the Act of incorporation, to be to promote the observance of such regulations as might be by by-law established, not being contrary to law, and to adjust, settle, and determine, controversies and misunderstandings between persons, members of the association, engaged in the produce and provision trades, or which might be submitted to arbitration as thereafter provided.

The corporation was also empowered to appoint arbitrators to hear and decide controversies, disputes, or misunderstandings, relating to any commercial matter which might arise between members of the association, or which might be *voluntarily* submitted for arbitration by the parties in dispute.

The Act itself seems only to contemplate an arbitration in cases where the parties in difference have chosen voluntarily to submit their disputes; but the defendants contend that they were not restricted in this respect, but under their general powers to pass by-laws, not contrary to law, were empowered to pass a by-law to render arbitration compulsory at the instance of either of the parties to the dispute if, upon the presentation by him of a case in writing to the committee of management, and production before

them of evidence to their satisfaction that he has just grounds of complaint, they came to the conclusion that such grounds existed.

The 7th section of the Act, in express terms, authorizes the corporation to expel a member for such reasons, and in such manner, as may be by by-law appointed.

The by-law to which I have referred goes on to provide, that if, after the president and committee of management have decided that such grounds of complaint exist, the member complained of still continues to refuse to submit his case to the board of arbitrators for their decision, such determination on his part shall be considered a flagrant breach of the constitution and by-laws of the association, and shall be deemed sufficient ground for suspension or expulsion from the exchange; but it is accompanied with this proviso, that such expulsion shall be decided on after the case shall have been submitted to a full meeting of the association, and the same agreed to by a two-thirds vote of all the members present, due notice having been first given to the party that such a meeting will be held, when an opportunity will be given him of being heard.

The plaintiff, in common with all the members of the association, signed an agreement to be governed by the by-laws, stating as one of the grounds for doing so their desire to avoid and adjust so far as practicable the controversies and misunderstandings which are apt to arise between individuals engaged in trade when they have no recognized rules to guide them.

No complaint was made under sec. 5, of Art. III., which provides that breach of business contracts, or other dishonorable conduct in business shall, upon proof, and after the party has had an opportunity of defending himself, be followed by expulsion. It would, I suppose, admit of no question, that if the committee of management had upon a complaint of that nature come to the conclusion that the non-payment of this freight, even though caused by circumstances beyond the control of the plaintiff, constituted a proper ground of expulsion, the merits of that decision

could not be questioned or reviewed in a Court of Justice. The party expelled would stand condemned by the sentence of a tribunal of his own selection, and would be concluded by it. It is to be assumed that the committee would give due weight to anything that might be brought forward to show that there was nothing dishonorable in the failure to carry out the obligation, but it is a matter entirely for their discretion, and they might decide that any failure to meet an engagement, wilful or otherwise, was a ground of disqualification. Having undoubted jurisdiction of the subject matter, their decision when acting in a judicial capacity could not be questioned, if the proceedings were regularly conducted in accordance with the provisions of the by-law.

No such question, however, arose here. The complaint of Messrs. Weatherson & Co., was, that they had a claim against the plaintiff which he repudiated; they did not contend that his conduct in so repudiating was of a disgraceful character, rendering him liable to expulsion, but desired to have an arbitration upon the matter under Art. 4, sec. 1, and an application was made to the plaintiff accordingly.

The plaintiff contended, whether rightly or wrongly it is not necessary now to consider, that a claim which had been settled, and another about which there was no dispute, could not be held to come within the meaning of the regulations respecting arbitrations, and that the claim for costs incurred in suing a third party against his express remonstrance, was not a controversy or dispute about a commercial matter. I say it is not now necessary to consider that, because after a resolution for his expulsion, which was subsequently withdrawn, he did agree to submit to arbitration; the subsequent difficulties all relate to the form of the submission.

Various negotiations and interviews occurred between the plaintiff and the officers of the association in reference to the form in which the claim should be referred to in the bond.

On the 11th of June the secretary informed the plaintiff

that he must sign the bond which the committee had decided on, and that if he did not do so by a named day a general meeting would be called on the 18th of June to take action in the matter.

Having declined to sign it in that form, the committee called a general meeting for the 18th of June, and I assume that notice was given to the other members in the same form as that sent to the plaintiff, viz., that a special general meeting would be held to receive a report from the committee regarding the conduct of a member.

At that meeting, the committee reported that the plaintiff refused to sign the bond unless certain additions were made thereto, and a motion was then proposed by Mr. Spratt, and declared carried, to the effect that the plaintiff should cease to be a member.

This resolution, however, was apparently not acted upon as at a committee meeting, on the 21st June, the president referred to the matter, and suggested that some course should be unanimously adopted by the committee, and hoped that some arrangement might yet be made by the parties concerned in the dispute, and it was then decided that the following words be inserted in the bond :

"A claim for balance of account for wheat, and of freight on said wheat, and interest and costs in connection with same, in which the defendant (*sic.*) has since admitted his liability in the items of balance \$1.06, and freight \$397.41."

At the adjourned special general meeting on the 25th of June, Mr. Spratt requested permission to withdraw the resolution to which I have referred, as there were so few members present, which was allowed. It was then moved that words identical with those adopted at the committee's meeting on the 21st be inserted in the bond.

Mr. Cannon was then allowed five minutes consideration to sign the bond.

Having refused to do so, the following resolution was submitted and adopted, and an amendment, which is set out below, rejected by a majority of 13 to 4.

Mr. Cannon having refused to sign the bond, Mr. Spratt

moved, seconded by Mr. Ryan, "That every consideration having been given by the council of this board to the dispute between Mr. Cannon and Messrs. Weatherston & Co., and the question having been brought up for final decision at the last special meeting called for that purpose, and Mr. Cannon having finally agreed to refer the matter in dispute to arbitration, has since declined to do so, excepting on certain conditions; now this board, believing that their by-laws have been arranged and agreed upon with due care and for the interests of this board, consider that Mr. Cannon has failed to fulfil his obligations to it, and therefore decide that he ceases to be a member of this Exchange, and also to receive any of its privileges in future."

It was moved in amendment by Mr. K. Chisholm, seconded by Mr. Sproule, "That as Mr. Cannon is willing to arbitrate on the question of law costs claimed by Mr. Weatherston, consequently that this meeting does not consider that he should be expelled for refusing to arbitrate on a matter which he does not dispute, namely, the freight, which he says he is willing to pay as soon as he is able."

This is the resolution complained of. One cannot help feeling that a great deal of the difficulty which has arisen in this case would have been avoided if the association, or the committee, had required, in the first instance, a more strict compliance with their own by-laws; especially in a matter where such serious consequences are to follow as the expulsion of one of their members.

The by-laws require that, in the event of any dispute or misunderstanding, the case shall be referred in writing to the committee. Now the only case so submitted here was that contained in Messrs. Weatherston's letter of the 5th of March, which was: We have a claim against Mr. A. M. Cannon, which he repudiates—with a request to arbitrate. They did not in any way specify the claim. At that time he did repudiate both the accounts for freight and the costs; but, although he intimated a doubt of the correctness of the other small item, he had paid it, and it could not consequently come within the complaint of the Messrs.

Weatherston; that could be no claim when they held the money in their own hands. He subsequently admitted the claim for freight. If this had been the only claim could the Messrs. Weatherston nevertheless have insisted that it should be referred to arbitration? There was no dispute about it. They might possibly have complained that the non-payment was a breach of a business contract, under sec. 5, art. 3, and upon sufficient proof to the satisfaction of that body, the association at a special meeting, after due notice to the plaintiff, might have expelled him, but no such course was taken.

How then does the matter stand? The plaintiff has consented to arbitrate; all parties concur in the view that the costs are the only matter still remaining in dispute, but the terms of the bond remain to be settled.

Sec. 7 of Art. IV. provides, that parties in a dispute availing themselves of the arbitration powers must sign the act of submission, and insert in it a clear statement of the case. The parties, not the committee, are to do this. No provision is made, in the event of the parties differing, that the committee or other body shall settle the terms, and declare that a non-compliance shall be deemed a refusal to arbitrate.

The first bond which was signed by Messrs. Weatherston and submitted to the plaintiff was in the most general terms: "having differences in a case touching a claim." This afforded no information as to the particulars of the claim, as required by the by-law, and the plaintiff, not unreasonably I think, declined to execute, but submitted one in these terms: "having a difference as to our rights in a case touching a claim for the costs of a suit of N. Weatherston & Co. against Gooderham & Worts," with a proviso that he should not be liable for the costs unless the same have been heretofore paid by Weatherston & Co., and also that if the award was against him, he was to be at liberty to have them taxed.

The plaintiff was then informed by the secretary that he must sign the bond in the form submitted to him, which

the secretary mistakenly informed him was in the form required by law, and in consequence of his refusal to sign it in that form the meeting of the 18th June was called.

On the 21st of June the committee decided to make the alterations as above, viz.: A claim for balance of wheat, amount of freight on said wheat, and interest and costs in connection with same, on which defendant has since admitted his liability in the items of balance of \$1.06, and freight, \$397.41.

The bond so altered was on the same or the following day submitted to Mr. Cannon, and on the 25th, at the general meeting, this was adopted, and the plaintiff requested to sign it in that form, and, failing to do so, was expelled.

Whilst I fully agree that in matters covered by the by-laws the decision of the meeting is conclusive, and cannot be enquired into, we must be satisfied that it is something so covered, and in a proceeding of this kind the parties must be held strictly to the terms of the agreement. It seems to me that this is a *casus omissus*, and that we are not at liberty to say that a *bonâ fide* dispute as to the terms of a submission is to be treated as a refusal to arbitrate, and to subject a party to the like penalties. And although the by-laws do not apparently require the decision of the committee to come before a special meeting for confirmation, but merely to be confirmed at a general meeting of the association, and therefore no notice of the object or purpose of the meeting was probably necessary, I should, speaking for myself, say that if a notice were necessary, that given was not such a notice as should be sufficient when a serious step of this nature was in contemplation. That notice might be sufficient notice to the plaintiff of what he might expect if he persisted in his refusal, but it gave little or no information to the other members. But however that may be, that meeting was called to consider the refusal of the plaintiff to sign the bond prepared in the very general terms I have referred to. At the adjournment a different question was discussed,

viz., whether the plaintiff was justified in refusing to execute the bond as subsequently settled by the committee.

The plaintiff was entitled, upon the clearest principles of justice, to have a meeting specially called to consider the altered state of things, and to be heard in defence : not by the members who attended the adjourned meeting, but by members called to consider the fairness of the statement of the case which the committee had, since the former meeting, thought fit to insert in the bond, and his refusal to arbitrate upon those terms, although, as I have above intimated, there was no absolute necessity in law to call a special meeting by notice, specifying the object.

The by-laws at present provide, that when the parties have consented to arbitrate they are to prepare a clear statement of the case. If it should be deemed desirable, in the event of their not being able to agree, to confer powers on some one else to prepare the statement, and to provide that the failure to execute the arbitration bond with that statement, shall be deemed a refusal to arbitrate, and subject the party refusing to the penalty of expulsion, that is a matter to be considered by the members, and may be provided for in an amended by-law. But if I am taking too narrow a view of the meaning of this by-law, I am still of opinion that the resolution was illegal, inasmuch as the plaintiff was required to arbitrate upon matters as to which, at that time, there was no dispute.

I agree, therefore, in thinking with the learned Vice-Chancellor, that the respondent was illegally expelled ; and that this appeal should be dismissed, with costs.

PATTERSON, J.A.—The defendant company was incorporated by the Dominion Act, 35 Vic. ch. 45, passed in 1872.

The seventh section of that Act empowers the association to expel any member for such reasons and in such manner as may be by by-law appointed.

One by-law of the association, article iii, sec. 5, enacted, that wilful violation of the constitution or by-laws, * *

breach of business contracts, either written or verbal, or other dishonourable conduct in business on the part of any member, when submitted to the committee of management, shall, upon sufficient proof thereof, and after the party charged therewith has had an opportunity of defending himself at any regular or special meeting of the association, be followed by expulsion, provided the vote to expel be carried by at least two-thirds of all the members present.

The law of the association respecting arbitration is found partly in the statute and partly in the by-laws.

Section 8 of the statute gives the corporation power to provide by by-law for the election or appointment by nomination of arbitrators, members of the association, to hear and decide controversies, disputes, or misunderstandings relating to any commercial matter which may arise between members of the association, or any persons whatsoever, claiming by, through, or under them, which may be voluntarily submitted for arbitration by the parties in dispute; but declares that nothing shall prevent the parties in any case from naming members of the association, other than members of the committee of management, as the arbitrators to whom the matter shall be submitted.

The Act gives a form of submission to be executed by the disputants, to which I may have to refer again.

Section 9 makes binding the award of a majority of the arbitrators who, under any by-law, or by nomination by the parties, or the submission, may be appointed to hear the case.

Section 10 requires the arbitrators to be sworn after their election, and before they act as arbitrators.

And section 11 gives authority to "the three members appointed to hear any case submitted for arbitration," or any two of them, to examine witnesses on oath, which seems to shew that there must be three arbitrators and no more, though this only appears in this inferential way.

The effect of these enactments seems plainly to be merely to provide for the appointment and swearing of arbitrators.

Every thing else, viz., the voluntary character of the submission, the proceedings at the reference, the effect of the award, and the mode of reviewing and enforcing it, are almost, if not entirely, left to the general law of the land.

The supplementary provisions of the by-laws are the following:—

ARTICLE IV.—RESPECTING ARBITRATIONS.

Sec. 1. All questions of disputes or misunderstandings which may arise between members of the association, may be submitted for settlement to the committee of arbitration, at the request of one or both parties, made in writing, addressed to the president or secretary-treasurer of the association.

Sec. 2. Should either party in the dispute refuse to submit to arbitration, the case shall be referred in writing to the committee of management, by the party deeming himself aggrieved, who shall produce evidence to the satisfaction of such committee that he has just grounds for his complaint, when the committee of management shall require both parties to submit their difficulty or misunderstanding to the committee of arbitration.

Sec. 3. If, after such decision has been given by the president and committee of management of this association, the defendant shall still refuse to submit his case to the board of arbitrators for their decision, such determination on his or their part shall be considered a flagrant breach of the constitution and by-laws of this association, and shall be deemed sufficient ground for suspension or expulsion from this Exchange—provided always, that such expulsion shall be decided on after the case shall have been submitted to a full meeting of the association, and the same agreed to by a two-thirds vote of all the members present—due notice having been first given to the party or parties that such meeting will be held, when an opportunity will be given them of being heard.

Sec. 7. Parties in a dispute, availing themselves of the arbitration powers granted to the association, must communicate with the secretary and treasurer, or assistant

secretary, sign the act of submission in due form before him, therein name the arbitrators, and insert a clear statement of the case.

This, it will be observed, makes it compulsory on members to submit their disputes or misunderstandings to arbitration, if so required by the committee of management, on pain of expulsion; provided that course is decided on at a meeting, which is probably meant to be a meeting similar to that spoken of in Article III., but it is not described in exactly the same terms.

Under Article III the opportunity for defence may be given and the expulsion voted at any regular or special meeting. Under Article IV the case is to be submitted to "a full meeting of the association," which may mean the same thing as any regular or special meeting, if it is a full meeting. I do not take "full meeting" to mean a meeting attended by every member. I imagine it means a meeting of the association, as distinguished from a meeting of the committee of management. Due notice has to be given to the party or parties being proceeded against that such meeting will be held, and that at it they will have an opportunity of being heard.

Having thus glanced at the law, let us trace the occurrences with which we have to deal.

On the 28th of February, 1878, N. Weatherston & Co., members of the association, sent an account to the plaintiff, who was also a member, charging one item of \$1.06 for a balance on the sale of wheat, and charging other items, which made the whole account \$725.65. These other items consisted of \$397.41 for freight, &c., paid Messrs. Gooderham & Worts, and interest, and \$307.82 for costs paid or incurred about some litigation with Gooderham & Worts.

In reply the plaintiff, on the 2nd of March, 1878, sent a post-office order for the \$1.06, expressing a doubt that he owed it, but saying that as the amount was small he gave them the benefit of the doubt; and he denied any liability for the rest of the account.

Thereupon Weatherston & Co. took steps to procure an

arbitration; and after some meetings and a good deal of correspondence, it was formally resolved, at a council meeting, which I understand to mean a meeting of the committee of management, on the 29th of April, that Weatherston & Co. had sufficient grounds for arbitration, and that Mr. Cannon be called upon to name an arbitrator at once. The plaintiff did not comply, and on the 3rd of May the secretary notified him that unless a satisfactory reply was received from him before Tuesday, the 7th of May, the matter would be brought before the general meeting in accordance with by-laws, Art. III., clause 5. At the annual general meeting on the 7th of May, it was resolved to call a special meeting for the 14th, and at that special meeting a motion for the plaintiff's expulsion was moved and seconded, when he said he would submit the matter to arbitration, and the resolution was withdrawn. Thereupon a fresh correspondence began, resulting in a form of submission being prepared by the committee, executed by Weatherston & Co., and presented for signature by the plaintiff. He refused to execute it, objecting to something it contained, but prepared and signed a counter form of submission as what he was willing to be bound by. The negotiations had by this time extended into June, on the 7th of which month the secretary wrote to the plaintiff with reference to the changes the plaintiff wished to have made, that there was only one form of arbitration bond recognized by the association, and requesting him to sign the one drawn out by the secretary, which he said was in strict accordance with the Act of incorporation.

We may pause here to see what the immediate dispute between the plaintiff and the secretary was about.

It appears that the plaintiff had, as early as the 20th of April, acknowledged his liability to pay a part of the account which he had at first disputed, namely, what he calls the freight bill, being, as I understand it, the items making the sum of \$397.41, and had offered his note for it at twelve months, which Weatherston & Co. had declined.

The plaintiff, therefore, contended that that item was no longer in dispute, and that the dispute was confined to the items for costs, amounting to \$307.82.

The submission prepared by the secretary described the matter to be referred in general terms as "a difference as to rights in a case touching a claim."

The plaintiff's document added to these words the words, "for the costs of a suit of N. Weatherston & Co. against Gooderham & Worts." The form in the schedule to the Act of Incorporation was, "having a difference as to our rights in a case touching have agreed, &c.," giving no countenance to the demand for the signature of so loose and general an instrument as that insisted on by the secretary, and which he said was the only form recognised by the association.

The council met on the 10th of June, and resolved that no additions be made to the form of submission, and on the following day the secretary wrote to the plaintiff that he must sign the bond by Friday the 14th, and that if he did not do so a general meeting would be called on Tuesday the 18th, to take action in the matter. In this letter the secretary again erroneously described the bond as "made out in accordance with the form prescribed by the Act."

On the same day, 11th June, the plaintiff wrote to the secretary stating that he appealed from the decision of the committee of management; pointing out that there was no misunderstanding between N. Weatherston & Co and him in relation to the original liability, and denying the right of the mere majority of one of the committee to assume the authority to say when he should pay his liabilities, whether a day or a year thence.

The council met on the 14th, and decided to call a general meeting for Tuesday the 18th. This meeting was called by a notice which stated that a special general meeting would be held on Tuesday the 18th, at 12:30 o'clock, "to receive a report from the committee regarding the conduct of a member of the association and other business."

At the special meeting on the 18th, a motion for the expulsion of the plaintiff was moved and seconded, and an amendment was also moved and seconded, to the effect that as the plaintiff was willing to arbitrate concerning the costs, he should not be expelled for refusing to arbitrate on a matter which he did not dispute. And the meeting adjourned till the 25th, without either motion being put.

At the adjourned meeting on the 25th, the resolution for expulsion was put and carried. Something further had in the meantime taken place; but before referring to it, I wish to test the validity of the expulsion upon the facts as they existed on the 18th, and as if the resolution had been carried on that day.

I think it is perfectly clear that the plaintiff had not been guilty of any breach of the by-laws concerning arbitration, which under their terms made him subject to expulsion. The submission prepared and insisted on by the secretary was not one which he could be reasonably required to execute. I do not now refer to the extent of the dispute as being confined to one item, or embracing the three items of the amount; but to the form of the submission, which did not define the matter in difference. The secretary misread the statute, which might not be so surprising if he had merely copied the schedule form, overlooking the duty of filling the blank. But he did fill the blank with the words, "a claim," making it read "touching a claim." With what idea he did this it is useless attempting to guess, when we find the by-law which should have been his guide declaring in the plainest of language, that the parties must sign the act of submission in due form before him, therein name the arbitrators, *and insert a clear statement of the case.*"

With this explicit direction provided for his instruction he persisted in stating to the plaintiff that the submission, which contained no statement at all of the case, was the only form recognised by the association; and there seems to have been no sufficient appreciation either of what a submission ought to be or of what their own by-laws said

it should be, among the gentlemen who took part in the meetings of the committee or of the association, to lead any one of them to correct the blunder of the secretary.

This strikes one as unfortunate, because the committee appear to have been sincerely anxious to accommodate matters, and to have exerted themselves to preserve good feeling, and to avoid proceeding to extremities.

Then if the plaintiff could not have been lawfully expelled on the 18th, neither could he, for the same cause, on the 25th.

Let us see if any fresh cause arose between those dates. A committee meeting was held on the 21st of June, at which a modification of the form of submission was agreed upon: the decision being to describe the claim as "A claim for balance of account for wheat, amount of freight on said wheat, and interest and costs in connection with the same, in which the defendant has since admitted his liability in the items of balance \$1.06 and freight 397.41." This, at all events, defined the claim, and so removed the fatal objection to the form of the instrument. But the plaintiff objected to submitting matters which were not in dispute, which he contended was the case with the two items said to have been admitted, and he wrote a letter on the 25th of June to the president clearly defining his objections. At the adjourned general meeting of that day the amendment proposed by the committee was made by a vote of the meeting, and it was then moved and resolved that the plaintiff be allowed five minutes' consideration to sign the bond; and he having refused to sign it the resolution for his expulsion was put and carried.

The statement of this action, particularly having regard to the short time allowed for consideration, is calculated to give an impression of harshness in the conduct of the members present towards the plaintiff.

I think that may be a wrong impression. I do not think what was done is properly open to the imputation of want of fairness, because the proposed amendment had been for days in the hands of the plaintiff, and his refusal was on the advice of counsel, not on the spur of the moment.

My own opinion is, that the items of \$1.06 and \$397.41 had ceased to be in dispute, and ought not to have been treated by the committee or the general meeting as subjects for arbitration. I find some difficulty, however, in holding that the plaintiff's assent to the by-laws did not bind him by the decision of the committee of management as to what was a dispute or misunderstanding which should be referred. I think the by-law would fall short of its intended effect if the members were not bound to respect the decision of the committee on such questions. Yet it must be open to any member, against whom another complains to the committee, to meet the complaint by frankly conceding the claim made, and so putting an end to the dispute or misunderstanding. It is one thing to recognize the jurisdiction of the committee to say what dispute is fit for arbitration, and another to hold that they can compel an arbitration in which, if the complainant succeeds to the full extent of his contention, he can only procure an award which shall declare what his antagonist declared all along.

Whatever dispute or misunderstanding had once existed about this freight item had ceased when the plaintiff conceded his liability to pay it. The difficulty which remained was, that he did not pay it. The effect of an award for the amount would, as I have already said, be equivalent to a judgment which could be enforced by execution. The object of proceeding to obtain an award, for money the right to which was not disputed, could only be as a means of enforcing payment.

While the statute undoubtedly contemplates an award of this kind, it leaves every one at entire liberty to refer his disputes or not as he may choose. When the association by its by-laws makes it obligatory to refer disputes on pain of expulsion, if it is intended to create by that enactment a tribunal to which every member must submit, not only for the decision of controversies, but for the enforcement of business obligations as to which there is no controversy, that operation of the by-law should be clearly expressed in its language. If so expressed and understood,

I do not see why persons, undertaking to obey the by-laws as a term of membership, should complain of expulsion for disobedience. But these by-laws are not so framed. They deal only with disputes and misunderstandings, and it is important to confine their operation within its legitimate limits, and not permit them to be used merely as machinery for the collection of debts, which would be the effect of including this debt of \$397.41 in the proposed reference.

There was, therefore, at the meeting of the 25th June, no refusal to arbitrate, but only a refusal to arbitrate about what was not in dispute.

I say nothing upon the question of the regularity of the proceedings, as placing or failing to place the meeting in a position, under the by-laws, to deal with the question of expulsion, if there had been a refusal to arbitrate. Upon the ground that there was no such refusal, I agree that this appeal must be dismissed, with costs.

GALT, J.—For the decision of this appeal it is only necessary to state that a dispute had arisen between the plaintiff and other members of the association, arising out of a purchase of a quantity of wheat. The latter claimed they had a right to have the question or questions submitted to arbitration under the Act of incorporation and by-laws of the defendants. The plaintiff refused to sign the form of bond proposed by the association, and suggested some changes in it. The case had been submitted to the committee of management. By the second by-law, should either party in the dispute refuse to submit to arbitration, the case shall be referred in writing to the committee of management by the party deeming himself aggrieved, who shall produce evidence to the satisfaction of such committee that he has just grounds for his complaint, when the committee of management shall require both parties to submit their difficulty or misunderstanding to the committee of arbitration. By by-law 2, if after such decision has been given by the president and committee of management of the association, the defendant in such case shall

still continue to refuse to submit his case to the board of arbitrators for their decision, such determination on his or their part shall be considered a flagrant breach of the constitution and by-laws of this association, and shall be deemed sufficient ground for suspension or expulsion from this Exchange. Provided always, that *such expulsion* shall be decided on after the case shall have been submitted to a full meeting of the association, and the same agreed to by a two-thirds vote of all the members present, due notice having been first given to the party or parties that such a meeting will be held, when an opportunity will be given them of being heard. There was a notice given on the 14th June, 1877, in the following form :

"Office of Corn Exchange Association.

"A special general meeting will be held at the rooms of the Corn Exchange Association on Thursday next, the 18th inst., at 12.30 o'clock, to receive a report from the committee regarding the conduct of a member of the Association, and other business."

It is to be observed that no name is mentioned, nor is any question of the expulsion of any member referred to. There was a meeting held pursuant to this notice, when the committee reported that Mr. Cannon refused to sign the bond of submission in the form approved by them. This meeting was adjourned until the 21st of June, and then to the 25th of June, in the hope some arrangement would be effected ; (the dispute was as to the form and subject matter of the bond.) On this last day it was decided that Mr. Cannon be allowed five minutes' consideration to sign the bond. He still refused to do so, except on certain conditions, and a resolution was passed for his expulsion.

In the view I take of these proceedings, it is not necessary to consider the merits of the case. I decide this appeal solely on the ground that the plaintiff has been expelled contrary to the express provisions of by-law 3. It may have been, as appears by the vote of the majority of the gentlemen present they thought was the case, that he had been guilty of a flagrant breach of the constitution, and

had afforded sufficient ground for suspension or expulsion; but no meeting had been called to consider the question of expulsion, and no opportunity had been afforded him of being heard on that point. The meeting had been called to receive the report of the committee, and having received it they were of opinion the plaintiff should be expelled unless he complied with the desire of the meeting; but no subsequent meeting was held, specially called for the purpose of considering the propriety of carrying that determination into effect.

MORRISON, J.A., concurred.

Appeal dismissed.

SOWDEN v. THE STANDARD FIRE INSURANCE COMPANY.

Insurance—Agent of company filling up application—Misdescription.

It was provided, by one of the conditions in the policy sued on, that if any one should insure his building or goods and cause the same to be described otherwise than they really were, to the prejudice of the company, or should misrepresent or omit to communicate any circumstance which was material to be made known to the company in order to enable them to judge of the risk, such insurance should be void.

The plaintiff signed a printed form of application in blank for an insurance on a block of five buildings, and told defendants' agent to make his own measurements and description. The agent filled up the application from an examination and diagram which he had made on a previous occasion, and in answer to the question. "Is there any other fact or circumstance affecting the risk with which it is necessary that the company should be made acquainted," replied, "No, it is a first-class building in every respect; although one roof covers all there is a solid brick fire-wall between each store."

The application contained an agreement that if the agent of the company filled up the application, he should, in that case, be the agent of the applicant, and not of the company.

There was not a solid brick wall between the stores, and the jury found that this was a misdescription of a fact material to the risk.

Held, affirming the judgment of the Queen's Bench, 44 U. C. R. 95, that the plaintiff could not recover.

Per BURTON, J.A.—That the clause in the application stating that the agent of the company filling up the application should be regarded as the agent of the applicant was not, by reason of its being made part of the policy, a condition thereof, and subject to the determination of the Judge as to whether it was just and reasonable; and if it were, it was not unreasonable.

THIS was an appeal from a judgment of the Court of Queen's Bench, discharging a rule *nisi* for a new trial, reported 44 U. C. R. 95. The pleadings and facts are fully stated there, and in the judgments on this appeal.

The case was argued on the 9th of March, 1880 (a).

C. Robinson, Q. C., for the appellant, plaintiff in the Court below. The evidence shews that Kirchhoffer acted as the agent of the Company in filling up the application; and the statements inserted therein by him on his own information, ought not to bind the plaintiff. It is submitted that the learned Judge misdirected the jury, in saying that by signing the application in blank the appellant made himself responsible for whatever was afterwards filled in by the agent. On the contrary, when he named the buildings he wished insured and the amount and directed the agent to satisfy himself as to other matters, the agent's authority as to what he should fill in over the plaintiff's signature, was sufficiently limited, and he had no authority to fill in as an answer by the appellant information which he had been told to secure for himself. The utmost limit, however, to which under any circumstances, the agent could be held to have an implied authority to fill in the application, was to give answers to questions which were printed in the application when the appellant signed it. Even if the appellant would be responsible if there was something material not disclosed in answer to the question: "Is there any other fact or circumstances affecting the risk with which it is necessary that the Company should be made acquainted?"—the agent was not authorized to make a statement not responsive to the answer, not concealing anything, but representing as existing that which did not exist. No implied authority to make such a statement was given to the agent; and if he were the agent of the applicant in filling up the application after it had been

(a) *Present*.—BURTON, PATTERSON, and MORRISON, J.J.A., and GALT, J.

signed, he was the agent of the Company in making that representation, and in accepting the application, knowing the manner in which the statement had been inserted. The clause in the application declaring that the agent of the Company filling up the application is to be regarded as the agent of the applicant, is made a part and condition of the policy, and as such should have been declared unreasonable by the Judge; but even if it be reasonable, it should have been indorsed on the policy under the Uniform Conditions Act as a variation of the statutory conditions, and not being so it is void. Although the jury have found that the misrepresentation was material to the risk, they were not asked nor did they find that it was material to be made known to the Company—and there should be a new trial, in order that this may be found. The evidence shews that the Company did not deem it material whether a building had fire walls or not. They made no such distinction in their classification of buildings for insurance, nor in their tariff of rates: *Samo v. Gore District Mutual Ins. Co.*, 26 C. P. 405, 1 App. R. 545; *Commercial Ins. Co. v. Ives*, 56 Ill. 402; *Universal Non Tariff Fire Ins. Co.*, L. R. 19 Eq. 485; *Bleakley v. Niagara District Ins. Co.*, 16 Gr. 198; *Sprague v. Holland Purchase Ins. Co.*, 69 N. Y. 128; *Sauvey v. Isolated Risk Ins. Co.*, 44 U. C. R. 523; *Shannon v. Hastings Mutual Ins. Co.*, 2 App. R. 81; *Wood on Insurance*, 628, 633, 636, 674, 683.

Bethune Q. C., for the defendants. The contention that the clause in the application notifying insurers that where the local agent fills it up he will be regarded as their agent and not the Company's, is a condition of the policy, is wholly untenable; but even if the Court should put such a construction upon it, we submit that the condition is a just and reasonable one, and one that companies are fairly entitled to insist on for their own protection. The clause in question plainly informed the appellant that Kirchhoffer would be considered as acting as his agent if he filled up the application, and from what took place there can be no doubt that the

appellant intended Kirchhoffer to act for him in procuring the insurance. By signing the application in blank, he made himself responsible for every thing that was stated therein by Kirchhoffer, and he is clearly bound by the statement in reference to the firewalls, which the jury have found to be false and material to the risk. It is true that they have not expressly found it was material to be made known to the Company, but this finding is really included in the former. He referred to *Chattillon v. Canadian Mutual Ins. Co.*, 27 C. P. 458; *May v. Standard Ins. Co.*, 30 C. P. 51.

March 27, 1880. PATTERSON, J. A.—The defence rests on the fifth plea. There is an equitable replication to the plea, which seems to be proved, but there is a rejoinder which is also proved, whereby we are thrown back upon the issue joined upon the plea itself. The plea alleges that the plaintiff, in his application for the policy, caused the buildings in the application mentioned, and insured under the policy, to be described otherwise than as they really were, to the prejudice of the defendants, by describing the same as follows: It is a first class building in every respect; although one roof covers all, there is a solid brick fire-wall between each store or building; whereas in truth and in fact there was not a solid brick fire-wall between each store or building of the buildings insured under the policy, such misdescription being of a fact material to the risk, and to be made known to the defendants, in order to enable them to judge of the risk they would undertake by the policy. This is alleged as a breach of the first statutory condition which, as printed on this policy, provides that if any person shall insure his building or goods, and shall cause the same to be described otherwise than as they really are, to the prejudice of the company, or shall misrepresent or omit to communicate any circumstance which is material to be made known to the company in order to enable them to judge of the risk they undertake, such insurance shall be of no force in respect to the property in regard to which the misrepresentation is made.

This condition, it will be observed, avoids the policy in either of two cases : 1st, if the assured causes the property to be described otherwise than as it really is, to the prejudice of the company. 2ndly. If he misrepresents any circumstance which is material to be made known to the company, in order to enable them to judge of the risk they undertake.

The plea charges that the assured offended in the first particular ; but there is no finding upon that point. The jury did not say, and were not asked to say, that the defendants were prejudiced by the alleged misdescription. And, indeed, from reading the evidence of the agent who took the application, and of the secretary of the company, I should find it hard to say there was any evidence on which such a question could have been found against the plaintiff.

The plea seems also intended to charge an offence against the second part of the condition, although it is only by giving the pleader the advantage of a liberality which he has no right to ask, that such a charge can be discovered, for it is certainly not made in the words of the condition. The plea alleges that the statement about fire-walls was a *misdescription of a fact*, where the condition speaks of a *misrepresentation of a circumstance*.

The plea charges that the misdescription was material for two purposes :

1st. Material to the risk.

2nd. Material to be made known to the defendants to enable them to judge of the risk they would undertake.

The condition refers only to the second species of materiality, and the finding of the jury is only upon the first. The finding is, that the misdescription was *material to the risk* ; and although it may be arguable that whatever is material to the risk must be material to be known to enable the company to judge of the risk, it does not follow that if the question had been put in the latter form it would have been answered in the same way. It was *this company* which had to judge of the risk ; and the opinions

of officers of other companies that the thing was material, might have been found to be beside the question, when the secretary and agent of this company explained that the absence of fire-walls did not affect the rate of premium charged by this company—if I am correct in so understanding the evidence they gave and the tariff they produced. The jury might have taken the view expressed in a similar case *Re Universal Non-Tariff Co.*, L. R. 19 Eq., 493, by Malins, V. C., when he said, “It is suggested on the part of the company, that they would have refused the risk, if they had known of the felt roof, but I am satisfied they would not have done so, and that a higher premium would not have been required; and I do not, therefore, consider that it was a material misdescription within the meaning of the first condition of the policy, and I am satisfied that no such defence would have been set up, if it had not been for the state of poverty of this company.” If nothing whatever had been said about fire-walls, it would in my judgment have been impossible to hold upon the evidence before us, and having regard to the tariff, form of application, &c., that there had been an omission to communicate a material circumstance which, under the condition, would vitiate the policy. Yet the test of materiality is the same whether the circumstance is stated or withheld.

It therefore seems to me that the objections to holding that the issues have been found for the defendants, which are so strongly put by Mr. Justice Armour in his dissentient judgment in the Court below, would be found, if open for consideration, to be far from unfounded. But the plaintiff has not renewed them before us; he has apparently deemed it prudent to accept the decision of the Court on those points; as he does not, by his reasons of appeal, ask for a new trial, or revive the controversy upon the matters I have noticed. He confines himself to the question of how far the plaintiff was bound by the acts of Kirchhoffer, the local agent, in filling up the application paper. In fact it does not appear that the other questions were raised by

the rule *nisi*, or that without raising them at an earlier stage of the case they could have been taken in the rule.

The evidence given upon the subject of the agency by the plaintiff, and by Kirchhoffer, substantially agrees. The buildings were not quite finished. The agent solicited the risk ; the plaintiff signed the blank form of application, and as his own evidence is noted, "told him the architect, and told him where he would get the plans and specifications."

The note of Kirchhoffer's evidence is : "Plaintiff signed the application in blank ; he told me to go to the buildings, and make my own measurements and my own description ; he also referred me to the architect and builder ; drew the diagram from the diagram in the Stadacona application."

That the plaintiff intended Kirchhoffer to fill in the answers to the questions in the application, or to write anything on the application paper as a statement made by the plaintiff, is a matter of inference only. There is quite as much room for the inference that he said, in effect, "I will give you no particulars. I ask for an insurance on the buildings. Inform yourself as to the character and particulars of the risk."

If he had said this to the authorized manager of the company there would have been no doubt that the company, accepting the risk, would have been bound. His mistake strikes me as having been in treating Kirchhoffer as the company's representative. If Kirchhoffer had reported to the company what occurred, and had explained that the plaintiff had simply signed the application, leaving the agent to ascertain for himself the particulars, which he had accordingly ascertained and now reported, the matter would have been equally free from question. The agent would have made the representation as agent of the company, as was held to have been the case in *Re Universal Non Tariff Co.*, L. R. 19 Eq. 485. Even if the nature of the transaction afforded evidence of authority to Kirchhoffer to insert answers to the questions, there is great force in the contention that the authority was confined to answer-

ing the questions, and did not extend to the communication of information not asked for, which it is argued is the character of the statement about the fire-walls. But the plaintiff has to encounter the other horn of the dilemma. The company issued the policy upon this application, and never agreed or intended to issue one without a completed application. Kirchhoffer had no power, and was not held out by the company as having power, to agree that a policy should so issue, and he did not communicate to the company the plaintiff's desire that he should be insured without being responsible for more than the application contained when he signed it. Therefore it seems reasonable that the company should be permitted to say: You must either adopt the application in the shape we received it and acted on it, or treat it and the policy issued upon it as null.

One question put to the jury was, "Did the plaintiff by his application for the insurance represent that although one roof covered all, there was a solid brick fire-wall between each store or building?" Which was answered, "Yes." I have no hesitation in reading the statement in question as conveying the information pointed at by this question. The criticism which has been applied to its language has not led me to perceive any inconsistency in the statement that one roof covers several buildings which are divided by fire-walls. It may be that fire-walls to be effective should extend above the roof; and that, when people speak of fire-walls, they are usually understood to mean walls which extend above the roof, as well as those which form fire proof barriers between the different houses. This description qualifies the ordinary acceptance by explaining that these fire-walls do not extend above the roof. With that qualification it asserts that there were fire-walls where there were none; and, assuming that, up to the first story, these walls were fire-walls, the reference to the roof may have the force of an express statement that the walls reach the roof, though they go no farther.

But the question answered by the jury goes further

than the meaning of what was in the application. It connects the plaintiff with it. And although there may be a trace of a question of law mixed up with this finding, it has been supported by the judgment of the Court, and I am unable to say that this decision of the Court and jury is wrong. If the plaintiff is taken to have authorized Kirchhoffer to fill up the application, I can find no satisfactory ground for dissociating this statement from the rest. The peculiar way in which it appears, being written after the word "No," which would have completely answered the question, and the nature of the statement itself, which, suggesting something that lessened instead of increasing the hazard of fire, have served as foundations for probably the strongest argument for the plaintiff on this point—namely, that the answer, not being responsive to the question, should on that account be treated as a voluntary statement made by the agent, and not as one made by the plaintiff's authority. In my opinion we should be yielding to a fallacy if we adopted that view. The subject matter of the answer was, assuming the materiality of fire-walls, covered by the question. And, if the agent were authorized generally to answer the questions, the responsibility of his principal for the answers given cannot be limited by a critical consideration of the precision with which a particular answer happens to fit the form of the question. The rule which required this would be impracticable of application to the business of life.

Either horn of the dilemma which, as it appears to me, confronts the plaintiff, is in my opinion fatal to his success upon the grounds on which this appeal is prosecuted.

If Kirchhoffer was his agent, *Cadit questio*.

If he was not his agent, neither was he agent of the defendants to bind them to insure except upon a regular application. In this view, the policy was always liable to be withdrawn by the defendants as soon as the true state of the facts appeared. The result of this which I think is the real position of the matter, would be, that the

plaintiff, never having been effectively insured, would be entitled to be repaid the premium. That, however, is not directly before us, the immediate question being whether, for the reasons he now advances, he can recover on this policy. I regret to have to conclude that he cannot, and that his appeal must be dismissed, with costs.

BURTON, J. A.—I concur in the result arrived at.

I wish merely to add that there is no foundation, in my opinion, for the contention that the clause in the application that the agent of the company filling up the application should be regarded as the agent of the applicant, and not of the company, must, by reason of its having been made part of the policy, be regarded as a condition of the policy, and therefore subject to the determination of the Judge as to its reasonableness or unreasonableness.

A notice of the limitation of the agent's authority, and a warning to intending insurers to fill up the applications themselves, or satisfy themselves of their correctness, given previous to or simultaneously with the application which is to be the basis of the proposed contract, cannot by any ingenuity be tortured into a condition of the contract itself; but even if it could be so considered, it is not an unreasonable or unjust condition, but one perfectly fair and proper. The company has a right so to limit the authority of its agents, and if done in a fair and open manner it would seem to be a proper course, both as regards their shareholders and other parties assured. What is to be regretted is, that the notice is not conveyed in so open a manner that there would be no pretence for a party saying that he had no notice of it, such as printing it across the application in ink of a totally different color, or some such means.

I feel that in the present case we are constrained to affirm the judgment.

GALT, J.—The facts of this case are not disputed. The simple question is, whether Mr. Kirchhoffer should be

regarded as the agent of the defendants or of the plaintiff in filling up the application on which this policy was issued. Mr. Kirchhoffer was the agent of the defendants in Millbrook, to solicit risks. The plaintiff stated. "I signed the application produced, same date as policy, signed it in blank. Mr. Kirchhoffer came to me to get an insurance on the property; he was the company's agent; Mr. Kirchhoffer solicited the risk; told him the architect, and told him where he would get the plans and specifications; never saw the application till after the fire; knew that the application would be followed by a policy, and that it would have to be sent to the head office for that purpose; did not see the policy till after the fire; it was at my place before the fire; but never looked at it."

Mr. Kirchhoffer stated: "Made application to the plaintiff for this insurance * * Plaintiff signed the application in blank; he told me to go to the buildings, and make my own measurements and my own description; he also referred me to the architect and the builder; drew the diagram from the diagram in the Stadacona application; he never saw the application after it was filled up; then forwarded the application to the defendants; about a month afterwards the policy came. * * I made no personal inspection of the buildings on the occasion of the risk; made no inspection at the time; had inspected the buildings on a former occasion. Had I known that the walls were not continued to the roof I would have represented the fact to the defendants."

In the application it is expressly stated, that if the agent of the company fill up the application, he will in that case be the agent of the applicant, and not the agent of the company. It was urged in the argument before us, that this was a condition which should appear on the policy as a variation from the statutory conditions, and as such was not the case the condition was void. In the view which I take of the evidence, it is unnecessary to consider this question. I agree with the ruling of the learned Chief Justice at the trial, when he told the jury

that if the plaintiff signed the blank application, leaving it to Mr. Kirchhoffer to fill up the answers to the questions, the plaintiff was bound by the representations so made by Mr. Kirchhoffer. I confess I cannot imagine a more ample delegation of authority than that which took place.

The plaintiff says he knew the application was to be forwarded to the head office for their consideration, and then signed it in blank, telling Mr. Kirchhoffer to obtain the necessary information and forward it for approval. In *Wood on Insurance*, p. 630, the learned author lays it down that, "Where the agent has neither actual or apparent authority to make a contract, but only authority to receive and forward proposals for a policy, and to deliver the same to the assured and receive the premium therefor, knowledge of the agent cannot be imputed to the principal, because in that case the assured has no right to regard the agent as clothed with power to do more than the nature of the business committed to him by his principal naturally includes." Again, at p. 636: "Where the agent has authority only to take applications and deliver policies, his knowledge of the facts is not imputable to the principal so as to estop the principal from setting up a breach of warranty expressed upon the face of the policy. As where the policy is 'on his two story * * building, occupied as a dwelling house,' the fact that the agent knew that the building was unoccupied when the policy was issued, does not estop the insurer from setting up such fact in avoidance of its liability. But where the agent is a general agent, and has authority to consummate the contract by the issue of a policy, and does so in the case in question, his knowledge is the knowledge of the company, and the misstatement by him of a material fact therein is not binding upon the assured."

We need not, however, proceed with the discussion of this point, because we are told by the agent himself that he did not know that the walls were not carried up to the roof. He says: "Had I known that the walls were not continued to the roof, I would have represented the fact

to the defendants." Consequently he had no knowledge which could be imputed to the defendants as knowledge by their agent. The case *In re Universal Non-Tariff Fire Ins. Co.*, L. R. 19 Eq. 485, does not apply here, because the learned V. C. Malins said, p. 500: "Upon a careful consideration of this evidence, and the other evidence in this case, I am of opinion that the description of the property was given to the company by Donald as their agent, and did not proceed from the assured at all, and they are not responsible for the mistake which was made as to the roof, or for any other misdescription of the property." It is not urged here, and could not be, that the defendants ever instructed Mr. Kirchhoffer to make a description of the property, or that they knew anything about it until they received the application.

In *Colonial Ins. Co. v. Ives et al.*, 56 Ill. 402, the Court were of opinion that on the evidence the person through whom the insurance was effected was the agent of the insurers and not of the insured.

In *Sprague v. Holland Purchase Ins. Co.*, 69 N. Y. 128, the policy contained a condition "that the application must be made out by an authorized agent of the defendants."

The result in my opinion is, that as Mr. Kirchhoffer was the agent of the plaintiff in making out the application, and as the jury have found that there was a misdescription material to the risk, and that the plaintiff did erroneously and untruly represent that there was a solid brick fire-wall between each store or building, which was a fact material to the risk, this appeal must be dismissed.

MORRISON, J.A., concurred.

Appeal dismissed.

GRIFFITH ET AL. V. BROWN.

Statute of Limitations.

In order to obtain convenient access to the upper rooms of their house the plaintiffs constructed a wooden platform, stairway and landing, on the outside of the house on the defendant's land. This structure was composed of planks laid upon blocks or scantling resting upon the ground, but the head of the stairs was supported upon posts which rested upon the ground. The platform and stairway were open to every one, including the defendant, and there was no bar or gate to prevent defendant from entering on his property. The defendant took no proceedings against the plaintiffs until the expiration of ten years.

Held, reversing the decree of Spragge, C., 26 Gr. 503, that the plaintiffs had not such possession of the land covered by the structure as by force of the Statute of Limitations to vest in them a title in fee simple; but that even if the statute had commenced to run it was stopped by the fact, as stated in the evidence, that during the ten years the defendant had temporarily taken up the platform, and used the land for his own purposes.

It was *held* on the evidence that this was not shewn to have been done by the plaintiffs' permission; but *Quære, per* PATTERSON, J.A., whether if it had been it would not still have interrupted the operation of the statute.

THIS was an appeal from a decree of Spragge, C., declaring that the plaintiffs had acquired a title in fee simple by length of possession to a strip of the defendant's land, over which they had erected a platform, stairway, and landing, for the purpose of reaching the second story of their building from the outside. The case is reported 26 Gr. 503, where the facts are stated in detail.

The case was argued on January 28th, 1880 (*a*).

The Court called on *C. Robinson*, Q.C., and *R. Gregory Cox*, for the respondents to begin. The facts in evidence shew sufficient possession to satisfy the statute. The platform, staircase, and landing were all one structure, affixed to the side of the store, the landing being supported by posts let into the land below. This was clearly a fixture, and not merely a portable chattel. It appears that it was erected for the exclusive use of the respondents and their prede-

(*a*) *Present*.—MOSS, C.J.A., PATTERSON and MORRISON, JJ.A., and ARMOUR, J.

cessors, and by means of it they had been in open, visible, and exclusive possession and occupation of the land in question upon which it stood, for more than ten years. It is true, that there was no railing or fence along the outer edge of the platform ; but it was raised some distance from the ground, and it was manifest to every one that the plaintiffs were in actual use of a well defined portion of the defendants' land. What is necessary is not a barrier, but a line of demarcation ; and if the limits of the ground possessed are clearly seen, and if, as a fact, there is an exclusive user by the claimant, as is proved here, the possession is sufficient. The platform and staircase, as long as they remained there, rendered it impossible for the appellant to use or enjoy the land they covered. The case of ground covered by an open verandah, and open space in front of houses which are built near to the street, with steps resting in the ground leading up to the door, are parallel cases, in which no one would doubt that the possession was sufficient to acquire title. As to the interruption of our possession, upon which the appellant relies, the proper conclusion to be drawn from the evidence, is, that it was done with our permission for his temporary convenience. Instead of turning the plaintiffs out, the appellant carefully preserved the plaintiffs' possession by placing blocks under the staircase to support it, in lieu of the platform temporarily removed ; besides, the subsequent restoration of the platform was inconsistent with the idea that the plaintiffs were taking possession of the ground as their own. Moreover, during the removal of the platform, the plaintiffs' possession was not interrupted, but merely rendered rather less convenient, as they still continued to use the staircase.

They cited *Bald v. Hagar*, C. P. 382 ; *Bunnell v. Tupper*, 10 U. C. R. 414 ; *Randall v. Sanderson*, 111 Mass. 114 ; *Thacker v. Guardinier*, 7 Met. (Mass.) 484 ; *Keats v. Hugo*, 115 Mass. 204 217 ; *Curbrey v. Willis*, 7 Allen. 364.

Walter Cassels, for the appellant. All that the respondents enjoyed over this property was an easement for the platform and stairway, which has not ripened into a title,

as twenty-years have not elapsed from their construction ; nor have they acquired a title by possession, as no acts of ownership over the property in question were shewn. It clearly appears that the only rights they ever sought to exercise over it was, the privilege of crossing the platform, which consisted of planks laid on the ground in no way affixed to the freehold, for the purpose of reaching the staircase. The possession obtained by reason of the platform was not, nor was it ever intended to be exclusive ; there was no fence or railing to prevent any one who chose from going over it ; and it is submitted that the mere laying down of planks with the view of facilitating the walking over the soil to reach the stairway, is not sufficient to vest the title in the respondents. But even if this were sufficient possession under the statute, the appellant interrupted its running, when he took up the platform and used the ground in question for six weeks, when he was raising the hotel. It is urged that this was done with respondents' permission, but the evidence utterly fails to sustain such a contention. He cited *Gray v. Richford*, 1 App. R. 112 ; *Farrington v. Bemdy*, 12 S. C. N. Y. 618.

March 2, 1880. Moss, C.J.A.—The decision is based upon the grounds that the plaintiffs, and their predecessors in title, had been in such exclusive possession of the strip of land in dispute as by force of the Statute of Limitations to vest a title in fee simple, and that the interruption of enjoyment relied on by the defendant had not been such as to stop the running of the statute and give a new starting point. With the greatest respect for the opinion of the learned and experienced Judge, whose decree is the subject of the present appeal, I am unable to concur in either of these propositions. I am strongly inclined to suspect that the real character of the question involved was somewhat obscured by the learned discussion in which counsel indulged upon the topic of easements. No doubt it would be a decisive solution of the controversy, if it were determined that the right claimed or exercised by the

plaintiffs was in the nature of an easement, but however interesting may be that inquiry, I prefer not to pursue it in a case like the present, where it appears to be little more than speculative.

I have been quite unable to see that the possession of the plaintiffs was exclusive of the defendant. It is true that the wooden pathway or platform was placed on the ground for greater convenience in reaching the upper rooms in the plaintiffs' house, and it may be that although it was not the only mode of access, it was that most frequently used. This structure was simply composed of planks laid upon blocks or scantling resting upon the ground. The platform at the head of the stairs leading from this pathway rested upon posts, and may thus be said to have been more firmly annexed to the freehold. But this pathway, stairs, and platform, were open to every person, including the defendant, who had occasion or fancy to use them. There was no bar, or gate, or other contrivance, to exclude the defendant from entering upon his own property with the greatest freedom; and I should hesitate long before bringing myself to hold that such an enjoyment of such a structure vested an estate in fee simple of the defendant's land in the plaintiffs, and enabled them to requite his neighbourly kindness in permitting this mode of access to part of their property, by taking his land and building up so as to close his windows.

I have not seen any case which requires me to pronounce an opinion so repugnant to my feelings of natural justice, and I feel no inclination to create a precedent in that direction. The American cases to which we are referred, and the soundness of which I do not desire to dispute, lend no support to the plaintiffs' contention. They do no more than lay down the doctrine, that where one of two adjoining proprietors builds a house with projecting eaves, it must *primâ facie* be assumed that he has so built as to discharge the drip upon his own, and not upon his neighbour's land; and that, therefore, in the absence of evidence, either inside or outside of the deeds, as to the true boundary, it should

be determined by the line of the eavetrough. This doctrine seems to me to proceed almost *ex necessitate rei*, but I fail to see its application to the present discussion.

But although I confess that I entertain a strong opinion that the statute has no effect upon a possession of the kind here proved, I feel still less doubt that there was a resumption of possession by the defendant, which stopped its running, if it had commenced. There seems to me to be no reason for the contention that the defendant either got or asked permission to raise the sidewalk and use the land for his own purpose. We have the story of every person, who can be supposed to possess any information upon the subject, and the result is simply beyond doubt. The defendant entered upon this strip of land, raised the boards from it, and used it as he wished, simply because he naturally believed that he had a right to make use of his own property. The learned Judge is reported to have expressed the view that the removal of the stairway, which he did not fail to observe was before the expiration of the statutory period of ten years, was not satisfactorily made out to have been done in assertion of a right, but rather that it was a temporary removal of that, without the removal of which the defendant was unable to carry out his works on his own land. It was at this point, as I humbly conceive, that the learned Judge fell into error. He overlooked for the moment the potent fact, the controlling circumstance, that the land from which the defendant had removed this structure was as much his own as that upon which he was carrying on works. Literally construed, his language draws a distinction between this strip of land, which *ex concessis* was then the defendant's, and the land upon which his building stood. The learned Judge has referred, with marked approval, to the test suggested in *Darby & Bosanquet*, on the authority of *Tottenham v. Byrne*, 12 Ir. C. L. 376, that it is whether ejectment will lie at the suit of the person charged with being dispossessed against another person. I see no objection to applying this test in the present case, but it appears

to me to give a result which is quite decisive for the defendant. I have not been able to conceive, and counsel did not succeed in suggesting, any plausible ground upon which the defendant could, at any time during the six weeks when he was using this strip, have maintained an action of ejectment against the plaintiffs. Any such proceeding on his part would have probably been visited with severe reprobation, as an attempt to abuse legal process.

My brother Armour desires me to say that he concurs in this judgment.

I think that the appeal ought to be allowed, with costs, and the bill dismissed, with costs.

PATTERSON, J.A.—I shall make a short statement of the facts as I understand them, leaving out of view for the moment the existence of successive links in the chain of title, and treating the present parties as if the history dealt with them alone.

The plaintiffs and the defendant owned adjoining building lots, fronting on the south side of the main street in Welland. The plaintiffs' lot was east of the defendant's lot. The plaintiffs had erected on their lot a building, the lower part of which was used as a store, and the upper part of which was a low garret or loft, reached by a stair from the store. The dividing line between the lots did not run at right angles with the street, but ran obliquely in a south-westerly direction. The plaintiffs' building stood at right angles with the street, and encroached at the street four or five feet upon the defendant's side of the line, the west side of the building crossing the line about twenty feet back from the street. The building thus occupied a triangular bit of the defendant's lot. This bit of land is not now in question, and may be treated as belonging to the plaintiffs. What is important to note is, that for the space of twenty feet or thereabouts back from the street, the plaintiffs had no vacant land west of their building.

The defendant had a hotel on his lot, standing also at

right angles to the street, and at a distance of about six feet from the plaintiffs' store, and leaving a space or passage between the buildings of that width.

The oblique boundary line crossed this passage diagonally, and struck the hotel about forty-five feet from the street. It will thus be seen that for some twenty feet or more the whole of the six foot space belonged to the defendant; that is to say, as far back as the wall of the store ran before it crossed the line. From that point to where the line struck the hotel, the space belonged half to each party, being divided between them by a diagonal line.

This was the state of things in June, 1867. The plaintiffs then raised the roof of their building, and converted the loft into habitable rooms; and, in addition to the inside stair from the store, they made an outside stair. This stair was on the west side of the building, over part of the six foot passage. The structures erected consisted first of a platform or foot way, running fifteen feet or so from the sidewalk of the street, and being about four feet wide; secondly, of a stairway, something less than three feet wide, rising from the platform and reaching a landing which was supported by timbers resting on the ground. From this landing a door led into the upper story of the house. Another stairway descended from the landing, towards the rear of the building. The platform rested on blocks laid on the ground. The platform was wholly over the defendant's land, as were also some of the lower steps of the stairs. The rest of the stairs up to the landing were divided by the diagonal line between the plaintiffs and the defendant. The landing was nearly all over the plaintiffs' own land, and the rear staircase was wholly so.

This stairway and platform were used whenever required for access to the upper part of the plaintiffs' building, which was occupied by themselves or their tenants, until some time in 1878, without any interruption or complaint on the part of the defendant, except what I am now about to mention.

In the spring of 1877 the defendant raised his hotel by

means of jackscrews placed underneath it. In order to use these effectively, he required to occupy the space on which the platform rested. He accordingly took up the platform, which was easily movable, made use of the ground on which it had rested for his own purposes, and kept it so removed for six weeks, when he replaced it.

Upon these facts the plaintiffs insist that they have acquired title, under the Real Property Limitation Act, R. S. O. ch. 108, to all the land under their platform and stairway; and they propose to build upon it and darken the windows of the hotel, which depend upon the six foot space for their light. The defendant not unnaturally objects to this, and has emphasized his objection by removing the structures whose presence is claimed to have dispossessed him.

Thereupon the plaintiffs filed their bill, asserting that they have acquired a title in fee simple as against the defendant; and, although by their prayer they only ask to have it declared that they are entitled as against the defendant to the possession and enjoyment of the land, they have obtained a decree declaring that they are so entitled in fee simple.

I may remark in passing, that without disputing the law, as laid down by Lord Chancellor Sugden, in *Scott v. Nixon*, 3 D. & W. 407, and in one or two other cases, that the statute may, by its own force, not only extinguish any right which the original owner had, but transfer the legal fee simple to the party in possession, I think a much less meagre case ought to be made than that presented by this bill, before asking the Court to affirm, not only that the title of the former owner is extinguished, which is the extent of the express declaration of the statute (R. S. O. ch. 108, sec. 15), not only that such title as the owner may have had has passed to the person who ousted him, but that the title acquired is a title in fee.

At the hearing the learned Chancellor's opinion leaned against the plaintiffs, but he ultimately held that the occupation of the land by the platform and stair was sufficient

possession under the statute; and that the resumption of possession, by removing the platform and using the place in connection with the raising of the hotel, was not an entry sufficient to stop the operation of the statute, because he considered it was not satisfactorily made out to have been done in assertion of right, but rather that it was a temporary removal of that, without the removal of which the defendant was unable to carry out his works on his own land.

In support of this view it has been urged before us that the defendant is shewn to have done the acts which he relies on as an interruption of the plaintiffs' possession by the permission of the plaintiffs. I do not so read the evidence.

We have the evidence of every one who could be supposed to tell how it happened. The plaintiff Griffith who owned the store, William N. Garden who occupied it, Thomas F. Brown the defendant, and his brother Patrick who worked at the job, all speak of the matter. Griffith is asked, "It was taken up without your permission?" And answers, "I presume it was. I did not know anything about it: it was raised up on its edge, and set against the building when I saw it, and not taken away from the land." Again: "And this was done without your leave?" Answer, "I had no intimation of it till I saw it." Garden, being asked, "Did they ask permission to take it up?" said, "No, he did not ask me." And further on: "Now was it replaced as soon as they got through with raising the building?" Answer: "Well, they put it back again, I do not know how soon; I asked Mr. Brown, or some of his men, how long it would be before they put it down, and they said shortly, and they did put it back again;" with much more dialogue to the same purpose, but no suggestion that any permission to enter on the land was asked or given. The defendant, Brown, says he asked no permission, but took the platform up because the ground belonged to him, and because he required to use it. And he speaks of Mr. Garden coming when they first began to tear up the platform,

and saying, "Aint you going to put it down again?" to which Brown replied that he would, if it would be any accommodation to Garden. Patrick Brown relates the same conversation.

I doubt very much if the plaintiffs can be said to have had at any time possession of the land, or to have done more than exercise a right of way over it, which, if continued long enough, might have given them a prescriptive right to the easement. But, assuming that they had possession to the exclusion of the defendant, it seems to me beyond possible question that, upon the occasion of the raising, the defendant entered and excluded them. As the evidence is reported to us, it is all one way. Whether the tenant of the store spoke to him by way of remonstrance or by way of entreaty, when he asked about replacing the platform, there is no one who says that he had spoken to him before he had made the entry. The nearest approach to a suggestion of asking permission, or of recognition of any right, is in Patrick's evidence, when he says he went to McCollum's store and saw Griffith, and told them they were going to take the platform up, to which they made no reply. He does not say he asked permission, and Griffith says he did not ask it. At the time there was no reason why he should have asked permission. There was no dispute about the ownership of the land. At least it was not admitted, nor, as far as I perceive, contended, that it belonged to the plaintiffs. Jacob Brookfield, who owned the store when the stair was built, and who was the first occupant of the upper rooms, told his brother Emanuel, who was a witness in the case, that the question of the structure being on the hotel property had been raised.

I think we should lose sight of the principle of the Limitation Act, as settled by many cases from *Doe Corbyn v. Bramston*, 3 A. & E. 63, and *Nepean v. Doe*, 2 M. & W. 894, downwards, if we placed much stress on the animus with which land is occupied. The doctrine of adverse possession being inapplicable to the holding of the person who acquires title under the statute, the fact of possession

being, in the absence of a tenancy, all that is material, we should mete out justice with an unequal hand if we held that the true owner, though he resumes possession in fact, must show that he does so adversely to the wrongdoer who has intruded on his land.

Suppose the defendant, although he had said he would replace the platform, had refused to do so, what action could the plaintiffs have maintained against him? Trespass for removing the platform would have been defeated by a plea of *liberum tenementum*, unless the plaintiffs could have shewn that they were termors under the defendant; and assumpsit on the promise to restore it would have failed for want of consideration for the promise. The defendant's right to remove it from the land which was his own, could not have been contested, and his promise to replace it was merely an act of grace. The only consideration which occurs to me as conceivable, would have been that which might have existed if there had been a *bond fide* dispute as to the plaintiffs' right to have it there, and the plaintiffs had suspended the assertion of their right upon the defendant's undertaking to restore the *status quo*. But the evidence affords no foundation for surmising such a state of facts.

But how far would such an agreement, if it had existed, have advanced the plaintiffs' case? An agreement to restore possession in itself concedes an interruption of the possession. This is where much of the fallacy lies upon which the contention of the plaintiffs proceeds. I have pointed out why I think the idea that the defendant had entered by permission previously obtained from the plaintiffs was not supported by the evidence; but I am not prepared to assent to the conclusion that such asking and receiving permission would have had any material significance in the application of the statute. Bearing in mind what the plaintiffs have to establish, viz., that for ten years they had possession to the exclusion of the defendant—not necessarily adverse possession, because that is now no part of the inquiry, but actual possession in them, leaving only a right of entry in

him—whether they acknowledged his right of entry or claimed that the land was their own—the continuity of the possession was broken in fact, and none the less so because it was by their consent, given on the terms that the interruption should be only temporary.

The legal ownership being in the defendant, the plaintiffs could have had no right there except such as they derived from him. If his consent to their occupation ought to be inferred from his asking and obtaining leave to occupy for a time (if those things had happened), the legal effect of the inference would be, that they were his tenants-at-will; and the suspension of their occupation by mutual agreement, and their readmission to possession, would have constituted a determination of the first tenancy-at-will and a creation of a new one, with the added element, as in *Randall v. Stephens*, 2 E. & B. 641, that the landlord had resumed possession in the interval between the two tenancies, and had thus given a fresh start to the period of limitation.

Looking from the defendant's point of view, we may ask what action could the defendant have brought during his six weeks' occupation. He might, at any time during the previous nine years, upon the hypothesis of the plaintiffs having possession, have brought ejectment against them, or have made an entry. To preserve his right, the statute required one of those acts to be done within ten years. He had within that time made an entry. An action of ejectment for land he was himself occupying and using would have been a proceeding savouring strongly of absurdity.

It seems to me impossible to hold, upon any application of the principles of the statute which commends itself to me as correct, that the plaintiffs have acquired title to the land.

I think, therefore, that this appeal must be allowed, with costs, and the bill dismissed, with costs.

MORRISON, J.A.—I concur in the judgment of the learned Chief Justice.

Appeal allowed.

DAVIDSON V. THE BELLEVILLE AND NORTH HASTINGS
RAILWAY COMPANY.*County Court—Jurisdiction.*

The plaintiff sued in the County Court on the *indebitatus* count for \$375, claiming by his particulars:

Balance due from defendant to 1st Nov., 1877	\$120 00
Wages from 1st Nov., 1877, to 1st Nov., 1878... \$360 00	
Less amount paid	160 00
	<hr/> 200 00
	<hr/> \$320 00

On objection being taken at the trial to the jurisdiction of the County Court, the plaintiff was allowed to amend by striking out all the items except the first.

Held, affirming the judgment of the County Court, that the particulars were no part of the record, which shewed an amount within the jurisdiction of the County Court; but *Held*, also, that judgment for that sum would be a bar to any future action for work done at any time before the commencement of this suit.

APPEAL from the County Court of the County of Hastings.

The plaintiff sued on the *indebitatus* count, claiming by his declaration \$375.

He claimed by his particulars—

Amount of balance due from the within-named	
defendants to 1st November, 1877	\$120 00
Wages from 1st Nov. 1877. to 1st Nov.	
1878	\$360 00
Less amount paid	160 00
	<hr/> 200 00
	<hr/> \$320 00

At the trial he was allowed to amend by striking out all the items except the first, leaving his claim simply for the one item of \$120.

The question on the merits was, whether the plaintiff had been the servant of the defendants, or only the servant of a Mr. Lloyd, who had been managing director. He had worked during the time mentioned in his particulars, and from an earlier date, at \$30 a month, under the imme-

diated direction of Lloyd; and had been employed in duties some of which were connected with the private affairs of Lloyd, and not with the business of the railway.

The only witness was Mr. Sutherland, the secretary of the defendants. The plaintiff gave no evidence for himself. Mr. Sutherland became secretary in February, 1876. The plaintiff had been then over a year engaged. He took care of the stables, cleaned the offices, did errands, &c.

The inaugural meeting of the company took place in August, 1874. The first board of directors was organized in June, 1876. Between those dates there were provisional directors. A Mr. Pardee was president, and Mr. Lloyd managing director, until after November, 1877.

All the payments of wages to the plaintiff were made through the hands of the secretary, though, it appeared, from money supplied by Messrs. Pardee and Lloyd, or one of them. Those gentlemen were spoken of as having been virtually the owners of the railway, and they seemed to have provided money for carrying on the construction or working of it.

The learned Judge before whom the case was tried, without a jury, gave a verdict for the plaintiff for \$123.06. Subsequently a rule *nisi* to set aside the verdict, and enter a nonsuit or a verdict for fifty dollars for the defendants was discharged. The defendants appealed.

The case was argued on January 14th, 1880 (*a*),

H. Cameron, Q.C., for the appellant. The County Court had no jurisdiction to try this case, as the amount in controversy was not liquidated or ascertained by the act of the parties; and the Court had no power to give itself jurisdiction by striking out the debit of \$360 and the credit of \$160: *Furnival v. Saunders*, 26 U. C. R. 119; *In re McKenzie*, 6 P. R. 323; *Winger v. Sibbald*, 2 App. R. 610; *Hopper v. Warburton*, 7 L. T. N. S. 722; 32 L. J. N. S. (Q. B.) 104; *Harrison's C. L. P. Act*, p. 721, n. (*a*). There

(a) *Present*.—MOSS, C.J.A., PATTERSON and MORRISON, JJ.A.

was no proof that the sum of \$360 was due the respondent, and the Judge should have treated the admitted payment of \$160 as more than sufficient to pay off the only item of \$120 proved to be due him. No contract, express or implied, was proved between the parties at the trial; but, on the contrary, there was evidence of an express or implied contract of hiring by the respondent with Pardee & Lloyd. He cited *Ontario v. Quebec R. W. Co.*, 24 C. P. 334; *Taylor v. Cobourg, &c., R. W. &c., Mining Co.*, 24 C. P. 233.

G. D. Dickson, for the respondent. The question whether the respondent was in the service of the defendants was left to the jury, without objection to the Judge's charge, and their finding, which is supported by the evidence, should not be disturbed: *Leith v. O'Neill*, 19 U. C. R. 233. Neither the record nor the evidence shew any want of jurisdiction of the County Court to try the case. The learned Judge clearly had power to allow the amendment. It is admitted that there was no proof as to the payment of \$360, and the credit of \$160 was only given on that amount.

March 27th, 1880. PATTERSON, J. A., delivered the judgment of the Court.

I do not find that during the period of four months before November, 1877, for which the plaintiff claims the \$120, Lloyd was employing the plaintiff, as a rule, in any business but that of the defendants; at all events to an extent which would make it necessary for us to disturb the verdict, which finds the plaintiff to have been the servant of the defendants.

There is an objection raised to the jurisdiction of the County Court to try the case.

The plaintiff was paid up to the 1st of July, 1877. That payment was made in September, 1877. The item of \$120 is for four months, from 1st of July to 1st of November, at \$30 a month; but is not a sum arrived at upon any settlement or accounting between him and the defendants. He served, however, on the same terms for a year beyond

that date, viz., to 1st of November, 1878, and his whole wages up to that time would be \$480, of which he was paid only \$10. This amount of \$470 is wholly unliquidated, and would, whether liquidated or not, be beyond the jurisdiction of the County Court.

The particulars were originally framed, apparently, with the hope of being able to treat the \$120 as a liquidated amount, upon evidence which proved insufficient for that purpose, and then, by giving a fictitious credit for a sum of \$160, which never was paid, to reduce the claim for the latter period to \$200; and so to recover for \$120 liquidated, and \$200 unliquidated. That scheme failed, and the amendment was then resorted to.

As the matter stands at present I do not think the question of jurisdiction properly arises. The particulars are no part of the record, and the effect of the plaintiff's recovery must depend on the record proper.

By the record it appears that by action commenced on 14th of November, 1878, the plaintiff claimed to recover a debt due him by the defendants for work done, &c., and upon that he has a verdict for \$120. I think it clear that if he recovers judgment for that or any other sum upon this record, it will be a bar to any future action for work done at any time before the commencement of this suit.

There are many decisions on the subject. The effect of a few of them, bearing on the precise facts of this case, will be found concisely and accurately stated in sec. 1514 of *Taylor* on Evidence, 6th ed. It is there said, "If a plaintiff, having declared on several causes of action, fails to establish some of them at the trial for want of evidence, he cannot bring a second action to recover damages for these last, unless he elects to be nonsuited generally, or can induce the Court to set aside the verdict he has obtained: *Stafford v. Clark*, 2 Bing. 382, per Best, C. J. So, if he sues for a part only of an indivisible claim, as if one serves another for a year under the same hiring, and then brings an action for a month's wages, it is a bar to the whole: *Miller v. Covert*, 1 Wend. 487. Upon the

same principle, if a plaintiff, knowing that he has an unliquidated claim against the defendant for a large amount, chooses to sue him for a less sum than is due ; or if, having a demand for £60 in three sums of £20, he consents at *Nisi Prius* to take a verdict for £40, he cannot afterwards bring a second action for the residue: *Lord Bagot v. Williams*, 3 B. & C. 235, 241."

The general doctrine is thus stated by Willes, J., in *Nelson v. Couch*, (15 C. B. N. S. at p. 108): "Where the cause of action is the same, and the plaintiff has had an opportunity in the former suit of recovering that which he seeks to recover in the second, the former recovery is a bar to the latter action. To constitute such former recovery a bar, however, it must be shown that the plaintiff had an opportunity of recovering, and but for his own fault might have recovered in the former suit that which he seeks to recover in the second action. Every one is familiar with the case of a party who brought an action for the recovery of £1000, and for default of evidence recovered £5 only, and then brought a second action to recover the balance ; and the recovery in the former action was held to be a bar to the latter, on the ground that the plaintiff had had an opportunity of recovering in the first action the whole of his demand, and that, regard being had to the shortness of life, it was unreasonable to allow a defendant to be vexed a second time for the same cause."

Amongst the cases in our own Courts, which are collected in Messrs. Robinson and Joseph's Digest, I may refer to *Deacon v. Great Western R. W. Co.*, 6 C. P. 241 ; *Chisholm v. Morse*, 11 C. P. 589 ; *Stinson v. Branigan*. 10 U. C. R. 402, and *McKay v. Fee*, 20 U. C. R. 268. In connection with the last named case, see *Florence v. Jenings*, 2 C. B. N. S. 454.

It has been made a ground of appeal, that the Judge improperly allowed the amendment of the particulars in striking out the debt of \$360 and the credit of \$160, to give himself jurisdiction. I see no ground for interfering with such an amendment. But the objection now made to

it was not made in the Court below, and therefore is not a matter for us to deal with. The objection in the rule *nisi* was only for allowing the withdrawal of the credit of \$160, which the defendants claimed should have remained for their benefit after the item of \$360, on which it had been credited, had been struck out.

Another ground of appeal, founded on the form of a rule setting aside a previous verdict but without in so many words ordering a new trial, appears here for the first time, the objection neither having been taken at the trial or in term; and is not founded on any materials certified to us by the Judge. I do not care to recognize so irregular a proceeding by even discussing the subject of it.

As to the credit of \$160, it is again insisted, as a separate ground of appeal, that the defendants should have been allowed that amount as paid on the \$120, leaving a balance in their favor. No reason has been shown for this. The plaintiff never admitted by his particulars or otherwise that that sum was paid him except as on account of the larger sum which he is content now to forego. The defendants cannot separate it from the connection in which it appears in the writing on which they rely. They must take the whole together if they take any part. But they have themselves disproved the payment by the express evidence they have given.

Upon the question of jurisdiction I may remark that, although for the reasons I have given, it does not appear necessarily to arise in this case, I think the principle on which the cases of *Jordan v. Marr*, 4 U. C. R. 53, and *Thomas v. Hilmer*, 4 U. C. R. 527, were decided applies against the contention of the defendants, and that nothing which has been advanced before us has been sufficient to show that at any particular moment during the progress of the case the Judge was bound to treat it as beyond his power to proceed with. The record showed no excess of jurisdiction, as *non constat* that the claim was not liquidated; and when the plaintiff proves that he rendered services which would entitle him to a sum over

\$200, but for which he is content to take a verdict within that sum, the principle upon which, if a verdict beyond \$200 had been rendered would have justified his entering a *remittitur damna* for the excess and taking judgment for the authorized amount only, extends in my opinion to such a mode of proceeding.

I do not regard it as splitting a demand into two parts, but as proceeding for one demand in respect of which the plaintiff is content to forego his extreme rights. Whether this view, which I think the correct one, may be satisfactory to the plaintiff, is for him to consider. He is entitled in accordance with that view to have this appeal dismissed with costs, and may then take judgment for the \$120 with whatever consequences attach to it, or take such other proceedings as he may be advised. But as he has not supported his case upon the distinct view which I have taken of it, I think it not unreasonable that if he should prefer to have the appeal allowed upon the ground that his real claim exceeds the jurisdiction of the Court, and that he does not desire, by adhering to his present position, to abandon any part of what he conceives himself entitled to, he should have the option, upon intimating his desire within the present week, to let the judgment of this Court be pronounced for the appellants.

CARROLL V. FITZGERALD.

Married Woman—Statute of Limitations.

Held, reversing the judgment of the County Court, that notwithstanding R. S. O., ch. 125, sec. 20, a married woman is still entitled, under 21 Jac. I., ch. 16, to bring an action in respect of her separate property within six years after becoming discovert.

APPEAL from the County Court of York.

DECLARATION. Common counts.

Plea : That the alleged cause of action did not accrue within six years before the commencement of this suit.

Replication : That at the time the said debt was incurred, and from thence to within six years next before the commencement of this suit, the plaintiff was a married woman, and as such under a disability, within the statute in that behalf; and that she commenced the action within six years after her husband's death.

Rejoinder : That the moneys sued for by the plaintiff, and which are the subject matter of this action, accrued, were, and still are her separate property and estate, in respect of which she was entitled to bring her action in her own name, as an unmarried woman, more than six years before the commencement of this action, by virtue of the statute in that behalf.

To this rejoinder the plaintiff demurred, on the ground that it was no answer to the replication.

The learned Judge of the County Court gave judgment in favour of the defendant.

The plaintiff appealed.

The case was argued on March 5th, 1880 (a).

McMichael, Q.C., for the appellant. The plaintiff was a married woman, at the time the debt was contracted, and continued so until within six years before the commencement of this action. She is therefore entitled to the

(a) *Present* --MOSS, C.J.A., PATTERSON and MORRISON, JJ.A.

benefit of the exception contained in the statute of 21 Jac. I., ch. 16, sec. 4, in favour of *femes covert*; and although the R. S. O. ch. 125, sec. 20, enabled a married woman to bring an action in her own name more than six years before the action was commenced, it did not take the plaintiff out of that exception. She was, notwithstanding that Act, still under the disability of coverture as long as her husband was living, and the mere fact that she might bring her action notwithstanding her disability does not deprive her of the exception contained in the Statute in her behalf. The case of *Taylor v. Parnell*, 43 U. C. R. 239, establishes that under the Statute of Limitations an infant has six years after attaining his majority, the right to bring an action for work and labour, notwithstanding sec. 5 of R. S. O. ch. 125. This is a very similar case to the present, as also is the case of *Forbes v. Smith*, 11 Ex. 161, 164. The English Married Woman's Act, which is similar to ours, shews that the intention of the Legislature was not to remove the disabilities of married women. He referred to the following authorities: *Richards v. Richards*, 2 B. & Ald. 454-5; *Battley v. Faulkner*, 3 B. & Ald. 294; *Nevitt v. Holland*, 18 Q. B. 262; *Townsend v. Deacon*, 3 Ex. 706; *Towns v. Mead*, 16 C. B. 125-135; *Darby & Bosanquet on Limitations*, 36, 103; *Simpson on Infants*, 61, 92, 94.

Eddis, for the respondent. The exceptions contained in 21 Jac. I. ch. 16, are only meant to apply to persons under the *disabilities* therein mentioned. The four exceptions which were originally made (now only three) were each created upon different considerations, and each stands upon a different footing. The case of coverture differs materially from all of the others, from the fact that although their disabilities were dependent, in the cases of infants and lunatics upon the incompetency of mind or intellect, and in case of persons beyond the seas upon questions of inconvenience, there was nothing to prevent any of them from bringing their action at any time, even during the existence of the disability, for their own benefit; but a married

woman was wholly unable to bring her action without her husband's concurrence, and then he had to be made a party, and was entitled to the amount recovered: *Darby & Bosanquet* on Limitations, 135. A married woman's disability rested upon the ground that she could do nothing without her husband's consent, and the exception in her favour was created upon that ground. The Married Woman's Act of 1872, R. S. O. ch. 125, sec. 20, by enabling her to bring her action in her own name, as if she was unmarried, removed the grounds or reasons upon which the exception in her favour was created, namely, the disability to bring an action, and the doctrine, "*cessante ratione legis cessat ipsa lex*," should be held to apply. The Married Woman's Act of 1872 repeals, by implication, the exception in favour of coverture. It was evidently the intention of the Legislature to remove the exception, as will be found from comparison with all our own Statutes of Limitations, in each of which "coverture" is omitted as an exception. The inconveniences that would arise from holding that the exception in the Statute of Limitations of Jac. I. in favour of coverture still applies to married women in actions which they are entitled to bring in their own name under the Act of 1872, would be very great. The English Married Woman's Act is not similar to ours, and does not afford a married woman the same facilities for suing as ours does. Our statute appears to be adopted from some of the Statutes of the United States, several of which are very similar. He referred to *DeGaillon v. L'Aigle*, 1 B. & P. 357; *Hatchett v. Baddeley*, 2 W. Blk. 1080; *Corbett v. Poelnitz*, 1 T. R. 7.; *Re Gearing*, 4 App. 176-7; *Taylor v. Mead*, 11 Jur. N. S. 166 (cited in *Furness v. Mitchell*, 3 App. 520); *Kibbe v. Ditto*, 3 Otto 674; *Brown v. Cousens*, 51 Me. 305; *Thompson v. Craig*, 24 Texas 582; *Oeg v. Sumner*, 1 Cinc. (Ohio) 424; *Bishop* on Married Women, vol. ii. p. 29 (note); *Angell* on Limitations, pp. 201, *et seq.*; *Tyler* on Coverture, 313.

May 14, 1880. PATTERSON, J.A., delivered the judgment of the Court.

The demurrer to this rejoinder raises the question whether a married woman, suing in respect of her separate property, is entitled still to the six years after becoming discoverd, given by 21 Jac. I., ch. 16, sec. 7, within which to bring her action, notwithstanding the extension of the powers and the removal of actual disability to sue by our legislation.

he learned Judge of the County Court of the County of York decided the demurrer against the plaintiff, and this is her appeal from that decision.

The statute of James became part of the law of this Province by the adoption of the English law respecting property and civil rights by 32 Geo. III. ch. 1, sec. 3, and remains in force, except so far as varied by our own legislation. In several particulars it has been amended or explained by express enactments; as, *e. g.*, by removing absence from the Province from the list of so-called disabilities of a plaintiff; by repealing the exception of such accounts as concern the trade of merchandise; and by providing for the case of one or more of several joint debtors being absent. There is no enactment professing in express terms to do away with the disability of coverture as affecting the limitation under the statute. The contention of the defendant is, that that effect is virtually produced by the operation of the provision which is now found in sec. 20, R. S. O., ch. 125, and which is in these words: "A married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property by this or any other Act declared to be her separate property, and shall have in her own name the same remedies against all persons whomsoever for the protection and security of such wages, earnings, money, chattels, and property, and of any chattels or other her separate property for her own use, *as if such wages, earnings, money, chattels, and property belonged to her as an unmarried woman*; and any married woman may be sued or proceeded against separately from

her husband in respect of any of her separate debts, engagements, contracts, or torts, as if she were unmarried."

It is impossible to deny that the considerations upon which the judgment below proceeds, and which have been very clearly presented to us by Mr. Eddis, in his argument for the respondent, have much force. The case of *Brown v. Cousens*, 51 Me. 301, referred to by the learned Judge, and the case in the Supreme Court of the United States, of *Kibbe v. Ditto*, 3 Otto 674, to which Mr. Eddis directed our attention, are instances in which statutes of the States of Maine and Illinois, similar in effect to the Statute of James, were held to be modified by later statutes of the same States coinciding with our Married Woman's Acts in the particulars now in question, although the later statutes did not profess to vary and did not by their terms refer to the earlier ones. The reasoning upon which those decisions were founded would, if we felt ourselves at liberty to apply it here, lead directly to the conclusion contended for by the respondent. The argument may be shortly put thus: The general statutory limitation was subject to exceptions in case of certain specified disabilities; one of these was coverture; but coverture ceased to be a disability when the *feme covert* was enabled to sue in her own name without joinder of or interference by her husband; therefore the exception was by implication annulled.

To apply this argument, however, we should have to read the statute of James, not as defining the persons or classes who were to be within the exception, but as laying down a general rule to the effect that the exception should exist while the individual was unable in law to bring an action, and should cease as soon as the ability to sue was restored. This is not the scope of the statute either in its terms or in its effect. It does not use the word "disability" or any synonyme. It declares that persons being within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, shall be at liberty to bring action within the limited time after becoming

of full age, discreet, of sane memory, at large, or returned from beyond the seas ; and although the word disability has been perhaps somewhat loosely used as a convenient general term to include the several conditions of the persons enumerated, it is clear that most if not all of such persons could, if so disposed, have brought actions during the period of their so-called disability. The saving in their favour was not because they were of necessity disabled from suing.

The reports contain numerous cases illustrative of this, some of which have been cited to us. One striking case is the comparatively early one of *Williams v. Jones*, 13 East 439, which was followed in our Province in *Simpson v. Privat*, 2 U. C. R. 265, and *Lane v. Small*, 5 U. C. R. 448. In *Williams v. Jones* both parties had been together in Calcutta after the cause of action had accrued ; the plaintiff might have sued the defendant there ; and the statute of James was in force there ; yet the plaintiff was held entitled to sue within six years after the defendant's return to England. In *Lane v. Small*, Sir John Robinson, C.J., refers to *Williams v. Jones*, as a strong illustration of the obligation which the Courts in England feel themselves under of allowing to the plaintiffs, literally and to the full extent, the benefit of the exceptions contained in the statute.

In the American cases to which reference has been made the local statutes of limitation were construed on the principle of the maxim *cessante ratione legis cessat ipsa lex*. It is seldom that this rule can be applied to statute law without some encroachment upon the province of the Legislature, and any attempt to apply it must be at the risk of misinterpreting the intention of the Legislature, unless that has been very distinctly expressed. More than one illustration of this exists in our legislation. One may be found in the law respecting wills. Under the old law of evidence the credibility of a witness was destroyed by his being interested in the subject of the proceeding in which he gave his evidence. Hence, when the Statute of

Frauds required to the validity of a devise of land that it should be attested by *credible* witnesses, a devise to one of the attesting witnesses, by destroying his credibility, invalidated the will. The statute 25 Geo. II ch. 6 restored the credibility of the witness by annulling the devise, and thus removing his interest. When the law of evidence was changed, and the interest of a witness no longer affected his credibility, the application of the maxim *cessante ratione legis cessat ipsa lex*, would have led, upon the reasoning we are now discussing, to the conclusion that a devise to an attesting witness was valid. Such a decision would, however, have failed to interpret correctly the legislative will, as was shown by the passage, several years after the adoption of the present law of evidence, of the Act 36 Vic. ch. 20, sec. 12, O., which continued to avoid the devise of realty, and involved in the same consequence a legacy of personalty, to an attesting witness or to wife or husband of such witness, following the Imperial Wills Act 1 Vic. ch. 26, which was passed while the old law of evidence still prevailed in England.

We have thus a warning of the danger of mistake in attributing to the Legislature the intention to affect the operation of the express words of one statute by reference to the policy supposed to underlie the provisions of another. We should in so doing usurp functions of the Legislature which, in dealing with this subject, have been exercised in removing coverture from among the disabilities enumerated in other Statutes of Limitation, while the amending hand has not been extended so far as the Statute of James. (Compare C. S. U. C. ch. 78 sec. 8 with R. S. O. ch. 61 sec. 3; and compare C. S. U. C. ch. 88 sec. 42 with 38 Vic. ch. 16 sec. 5, or R. S. O. ch. 108 sec. 43.)

The question for the Courts must be, does the plaintiff answer the description given in section 7? Is she, or was she, within six years, a *feme covert*? If this must be answered in the affirmative, there is no escape from the plain words of the statute. It could only be answered in the

negative by shewing that by virtue of the statute respecting married women she ceased to be a *feme covert*. I have already quoted the words of section 20. If they had gone so far as to declare that *quoad* her separate property the *feme covert* should be deemed a *feme sole*, it might have been possible, with the aid of some subtlety, to maintain that in all proceedings by her in respect of her separate property she ceased to fill the character of *feme covert* within section 7 of the statute of James, and so was bound by the six years' limitation under section 3. But, unfortunately for the defendant, section 20 dealt with procedure only, authorizing *the same proceedings as if she were unmarried*, but stopping short of declaring that she shall not be regarded, even in relation to the property, as a married woman.

We must allow the appeal with costs, and direct judgment for the plaintiff on the demurrer.

Appeal allowed.

CAMPBELL V. PRINCE.

County Court—New trial on matter of discretion—Costs.

Although the jurisdiction of the Court of Appeal is not limited in appeals from the County Court as it is in appeals from the Superior Courts, under sec. 18, sub-sec. 3, of the Appeal Act, it will not in ordinary cases interfere where a new trial has been refused by the County Court upon a matter of discretion only.

In this case, however, being an action for assault against a public officer, in which the jury had found a verdict for \$100, and a new trial, asked for on the ground that the verdict was against evidence, was refused, the Court of Appeal granted a new trial, as the evidence strongly preponderated in the defendant's favour and there was reason to believe the jury had been misled by the charge.

As the judgment was varied on a matter of discretion, no costs of appeal were given.

THIS was an action in the County Court of the county of York, brought by a Mrs. Campbell, whose husband was joined for conformity only, against Captain Prince, the Warden of the Central Prison, for an assault.

The pleas were, first, not guilty, upon which issue was joined; and, secondly, a plea which was added by leave at the trial, justifying the alleged trespass as a gentle laying on of hands, for the purpose of removing the plaintiff from a room belonging to the defendant for the purposes of his duties as warden, in which the plaintiff was trespassing and making a noise and disturbance, &c., and which she refused to leave after being requested by the defendant.

To this justification the plaintiff, without joining issue upon it or traversing any of its allegations, replied or new assigned excess. Nothing turned on the absence of an issue on the plea, nor on the absence of any traverse of the replication or new assignment, because the case was treated by all concerned both at the trial and in term as if everything alleged was in issue.

The trial took place before the senior Judge of the County Court with a jury, and the plaintiff had a verdict for \$100. The facts are stated in the judgment.

A nonsuit had been moved for at the end of the plaintiff's case, upon grounds which were afterwards embodied in the rule *nisi*. That motion was refused, and after hearing evidence on both sides the case was left to the jury upon a charge which was not objected to.

The rule *nisi* asked for a nonsuit on two grounds : 1st. That no assault was proved. 2nd. That plaintiff's conduct while in the defendant's office, assuming she had a legal right to go there, rendered her a trespasser *ab initio*; that upon being requested to leave, she refused; and that no more force was used than was necessary for her removal.

It also asked for a new trial on the law and evidence, on the ground that the evidence did not shew that an assault and battery had been committed, but the contrary; and that in any view of the case it fully proved the second plea; and that the verdict was against the weight of evidence.

The learned Judge, after argument, discharged this rule, and from this decision the defendant appealed.

The case was argued on the 3rd of March, 1880 (*a*).

Ferguson, Q.C., for the appellant. The rule should have been made absolute for a nonsuit, as the evidence offered on the respondent's behalf, which was in no way disproved by the appellant's evidence, established the truth of the appellant's plea, viz. : that she was guilty of most improper conduct in his office, and that when she refused to leave the room after he had requested her to go, he gently laid his hands on her for the purpose of removing her, using no more force than was necessary. It was also proved by her evidence that instead of using more force than was necessary, he did not use enough, as he did not succeed in removing her, and as this was not contradicted by the appellant there was no evidence whatever to go to the jury in support of the new assignment. The charge of the learned Judge was most unfair in the view of the facts

(*a*) *Present*.—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, J.J.A.

which it impressed upon the jury. It is manifest that the verdict is contrary to law and the evidence, and the rule should at least have been made absolute for a new trial. He cited *Glass v. O'Grady*, 17 C. P. 233; *Oakes v. Wood*, 2 M. & W. 791.

Delamere, for the respondent. The law as laid down by the counsel for the appellant is not correct. The question of fact was one wholly for the consideration of the jury. It was for them to say whether the respondent put his hands upon her for the purpose of removing her from the room. It is argued that the jury were misled by the learned Judge's charge, but no objection was made at the trial: *Archbold's Practice*, 12th ed., 1520; and a wrong observation by a Judge on a question of fact is no ground for a new trial: *Taylor v. Ashton*, 11 M. & W. 401. If there is any evidence at all to support the verdict it should not be disturbed.

May 17, 1880. PATTERSON, J.A., delivered the judgment of the Court.

The version of the transaction given by the plaintiff herself and by her witnesses, is that to which alone we can look in considering the propriety of a nonsuit.

Her story, shortly told, is to this effect. Her husband was a guard at the Central Prison. A letter had appeared in a newspaper alluding in some way to the prison or the warden. The plaintiff went to the prison to explain to the defendant that her husband had not written the letter. She saw the defendant in his room, and a colloquy took place in which she used language amply sufficient, as she herself repeats it, to warrant, and indeed such as to make it the duty of the defendant to order her out. He told her he would call the guard to put her out if she continued the language, and he did call the guard; but before the guard came he himself took hold of one of her arms with his hand, not attempting to put her out of the room, but squeezing her arm so as to hurt her, and in fact so holding her as to prevent her leaving the room. This is the assault complained of.

Upon this account of the affair, it would be shutting one's eyes to very obvious facts to refuse to see that the plaintiff herself proves most of the allegations in the second plea. She shows beyond all question, as it appears to us, although the learned Judge at the trial seemed to think it was still open for the jury, that she was ordered to leave the room. I have already said that she shows abundant reason for such an order. When she tells us that the defendant said, "I cannot allow this in this office: I cannot allow you to talk like this in my office: I will get one of my guard to remove you;" and when she gives her reply, "Remove me? What would you remove me for? This is a public office:" with much more in the same strain; it is scarcely giving one credit for fair perceptive powers to say that she was not warned to go. Then she says she was all the time willing to go, if asked, and that in fact, when the guard came in and asked her to go, she went at once without his having to employ any force whatever. But we must remember that the guard came only after the force she now complains of had been already used; and that moreover the guard, whom she called as a witness in reply, disproves her statement as to her willingness and ready submission when asked to go, showing that on the contrary she remained till she had said her last words to the defendant. His evidence is, "I simply tapped her lightly on the shoulder and said, 'Mrs. Campbell, please come with me.' She turned round, and as far as I can recollect the words, she said '*Yes Mr. Farrel, immediately.*' *She finished what she was saying with Captain Prince,* and she immediately turned on her heel and went away." This evidence of course was not before the Court on the original motion for nonsuit; but it was there on the motion in term, and as part of the plaintiff's evidence.

Thus we learn from the plaintiff herself her misconduct, the order to leave the office, and her refusal or delay. So full is the admission or proof of the justification pleaded as to really leave nothing which it could reasonably be contended should be left to the jury but the one question of

excess. It is not beyond dispute that even this ought necessarily to have gone to the jury, The rule which governs is that stated in *Ryder v. Wombwell*, which I now read from L. R. 4 Ex. p. 39. (The learned Judge read the passage.)

If the Judge in this case had nonsuited the plaintiff, we should not have thought there was ground for interference. We should probably have held that the balance strongly inclined towards the propriety of nonsuiting. But as he, having heard the evidence himself, considered it was proper to submit the question to the jury, we do not think we should now say, as a matter of strict ruling, that he was wrong; at the same time we give no opinion and lay down no rule to fetter the discretion of the Judge in the event of the case going to trial again.

The first ground for nonsuit, namely, that no assault was proved, was conclusively answered by the defendant's own admission that he had laid hands on the plaintiff, though he said it was to push her with his open hand, not to grasp her arm.

The questions left to the jury were: 1. Was there an assault committed?

2. Did the defendant tell the plaintiff to leave the premises, and did he give her sufficient time to go away before he put his hands on her?

3. Did he use more force than was necessary to remove her?

These were certainly the questions of fact on which the plaintiff's case depended; and although the first was put beyond dispute by the defendant's own evidence, and upon the second there was strictly no evidence proper to be left to the jury, if a reasonable construction were put upon the plaintiff's own story; and although, the verdict being general, it is impossible to say whether the jury found for the plaintiff upon the second question contrary to her own statement, or upon the third on which there was room for discussion, yet the whole was thus submitted to the jury without objection at the time, and no complaint has been

made, either in the rule *nisi* or the grounds of appeal, of any misdirection in this or in any other particular. The new trial is asked for only on the ground that the verdict is against evidence.

It is an appeal to the discretion of the Court, and the County Court refused the indulgence asked by the defendant for reasons which must be at once recognized as wise and sensible ones, and which, in any case but one of an exceptional character, should be treated as conclusive. These reasons were expressed in the following language: "If granted on payment of costs, the costs would amount to as much as half the verdict. There is no particular right independent of the damages involved in the issue. At the best the case is a frivolous and inconsiderable one. Another jury might and might not do as the last jury had done. Prolonging litigation in respect of a valueless conflict of this kind, between a man with a hot temper and a woman with an ill tongue, is not desirable even so far as the parties themselves are concerned."

In ordinary cases we should refrain from interference with the discretion exercised in the Court below; although in appeals from the County Court our jurisdiction is not limited in this respect as it is under section 18, sub-sec. 3, of the Appeal Act, in appeals from the Superior Courts. But reading the full report which has been furnished to us of the charge of the learned Judge who tried the case, we cannot avoid the impression that the appreciation of the evidence on the part of the jury may have been influenced by erroneous ideas of the position and rights of the defendant, and by views of the evidence put before them with much force and not always with entire accuracy.

That the weight of evidence greatly preponderated on the side of the defendant seems to us very apparent; that on one point left to the jury it was so, on the plaintiff's own showing, I have already pointed out. We should hesitate, however, before interfering, as an appellate Court, upon that ground, were it not that the charge of the Judge is, in the way to which I have just adverted, brought forward indirectly for review.

I should judge from remarks made by the learned Judge that the plaintiff is prepossessing in her appearance and demeanor. He said to the jury, "From her appearance I would say she is a remarkably intelligent woman, that she gave her evidence in a manner that is highly creditable to her, because we have heard it, and it was plain and it was straightforward, and so far then as appearance and the manner of giving evidence it is in the plaintiff's favour." I should myself gather from the report of the plaintiff's evidence that she was candid enough, and probably as accurate as could be expected in any one whose interest it was to relate particular incidents in the way that told for herself. I fear, however, that the eulogy addressed to the jury, while perhaps merited by the way she gave her evidence, may have diverted their attention from the evidence itself. When I read in her evidence that she replied to the defendant's remonstrance in the words I have already quoted, adding, "This is a public office, and you are a public official;" when I find her, however candidly, and perhaps a little boastfully, relating how she had charged the defendant with unfair treatment of her husband, and then telling us: "He was getting very much excited then, and he said, my good woman, my good woman, what is this all about? There is going to be an investigation, there is going to be an investigation about all this. And I said, quite cool—very firmly and very properly—I do hope there will be an investigation,—and I just looked him straight in the face all the time firmly—and I said I hope there will be a proper investigation, and if there is it will be very much to your disadvantage. I said, he was most unfortunate in his attacks—meaning his attacks on innocent people. Then I said to him, it would be well for you to take an example of Mr. Campbell's conduct and copy him if you can, or for instance try and take an example of Mr. Matheson there, who was sitting there at the time." And again: "Just while he was talking to the guard I said to him, put me out of here? I said, take care that I will not live to see you ignominiously turned

out of here, just as sure as there is a heaven above your bald head"—with more language of the kind; I only state an obvious truth when I say that the quietness of her manner in telling her story, or the credit she apparently took to herself for addressing the defendant as she did, ought not to have disguised the fact that the language she recounted was that of a virago, or to have kept out of view the position of defiance she evidently assumed, claiming a right to remain in the warden's office as a public room, and to take him to task as a public official. She says, in another place, "I always understood that was a public office. And again, being asked "Why didn't you leave before the guard came in?" She says, "I wasn't asked to. I was just simply talking. I just talked and said all I had to say, and that was just the truth, and straightforward and to the point, and when I said that and the guard was called in I just walked respectfully and quietly out." She argues upon this as a strong point to support her assertion that the defendant did not order her out, saying in another place, "Strange that I should have gone out so civilly and quietly with Mr. Farrel." I have already shewn how Farrel, the guard, modified this when he was asked about the same incident.

The learned Judge, commenting on the evidence of one Mullen, used these words: "He heard, though, that he would require to send for a guard to remove her. That is, he didn't give her to understand that he was going to remove her himself," thus apparently giving countenance to the theory on which the occurrences in the office were dealt with for the plaintiff, viz., that the order to leave the office must be a direct request to do so, and that it was not sufficiently conveyed by the declaration that she must not remain there if she persisted in the abusive language, and that if she did, the guard would be called to put her out.

Again, the learned Judge is reported as having said, "Then there was something said, I don't know who said it—I think Mr. Mullen or some one—about Mrs. Camp-

bell's being drunk, or something of that kind. Well, it is right to say there is no evidence of that, and the persons who saw her say there was nothing of the kind; and I think it is very unjust that such an imputation should be laid on a respectable woman. However, if he was acting under the dominion of his own good sense, he wouldn't have used that language towards any one." As far as I can judge from the report, I think these remarks, which were very damaging to the defendant, were founded on a misapprehension of the evidence. I do not recollect any allusion to drunkenness, except when Mr. Mullen says that Campbell, the husband, said to him that Capt. Prince accused his wife of being drunk, to which Mullen replied that he did not think she was drunk when she came into the office. I find no allusion to the matter in Campbell's evidence; and what is the important thing, no suggestion that any such imputation had been made to the plaintiff during the interview in the office. There are other matters touched by the charge, which could not be objected to as misdirection, but which, with those I have more particularly noticed, may have had an effect with the jury in leading them to look unfavourably on the defendant's case, and may thus have contributed to the finding which in our view is decidedly against the weight of evidence.

The only one of these passages which I shall quote is the concluding passage of the charge, which seems fitted to create false ideas of legal rights, and to foster the erroneous notion that those of a woman rest on a basis different from those of a man; and to suggest a test of the defendant's duty founded on sentiment or conventional traditions, rather than on juridical principle. The language I refer to is the following:

"And I must say just here, gentlemen, that I look upon the high position the defendant occupies. I think that it would be far more seemly in him if he hadn't put his hands on her at all, if he had gone into the other room that was off there, and called one of the guards to take her out, but I don't think it was a very dignified thing in

the warden to lay hands on a woman that is coming into his office, even though unusually. How would it do for a Judge? A Judge can issue warrants, arrest and commit persons, but how would it answer for a Judge to go down and seize a person and lay hold of him? And it is the same with the police magistrate—it would never do. The warden can command all the officers under him, and I think it would have been far more dignified if Captain Prince had gone into the other room and told one of the officers to go out and tell that lady, or whatever he calls her, that woman, to go out. She thinks that was said to her in a disdainful manner, and not complimentary to her. I didn't know the word. I believe when people quarrel they use the phrase 'that man,' or 'that woman,' and 'my good woman,' when you hear a quarrel take place, and perhaps one man may think himself better than the other, and he will say my good man don't do so and so—that is, that he isn't to do such things. The case is in your hands, and as I have already stated, in the event of your finding those propositions in favour of the defendant say so; if against him, then you will give such damages as you think proper, not exceeding \$200."

I am aware that in forming from the perusal of the plaintiff's evidence, as well as from the other testimony reported to us, an impression of her share in the occurrences in question far less flattering to her than that presented to the jury in the charge of the learned Judge, I do so without the advantage he enjoyed of seeing and hearing her; but I am disposed to think, when I find him speaking of her, in term, as a woman with an ill tongue, that the more favourable impression may have been due to a plausible demeanor and apparent candor in the witness box, which may for the moment have kept the other characteristics out of view. It is important to remember that in forming a judgment whether the force employed in any particular instance was excessive, or was no more than was reasonably necessary, a very material consideration is the state of things at the time, as regards the

attitude of the parties towards each other, the provocation offered, &c., &c. We cannot fairly take a the measure of what was reasonable, the exact degree of force or violence which we, judging at a distance of time, and in different circumstances, and in cool blood, may compute as sufficient. The test must be what would, to a man of ordinary coolness and firmness, have appeared under the circumstances to be reasonable or necessary ; and this cannot be correctly estimated without a just and fair appreciation of the conduct, at that time, of the person who now complains.

We think, therefore, that if the defendant desires a new trial it should be granted. Under sec. 291 of the C. L. P. Act, the costs of the former trial will abide the event. We vary the judgment of the County Court in a matter of discretion only, and can therefore give no costs of the appeal.

If the defendant signifies to the Registrar within a month his election to have a new trial, the appeal will be allowed, without costs, and the rule in the Court below made absolute, without costs, for a new trial, with costs of the former trial to abide the event.

Otherwise this appeal will be dismissed, with costs.

BACKUS V. SMITH ET AL.

Lateral support—Implied reservation of—Easement—Unity of seizin—Negligence.

The plaintiff, tenant for years of the defendant S., sued for loss of use of a tenement in consequence of the fall of the wall thereof, which was caused by the excavation of the adjoining lot for a cellar by the defendant H. who owned it. H. had excavated his land in some places to within a few inches of the dividing line, close to which the house in question stood. This house had been built by S. in 1854, when he had a lease of the lot for ten years, which gave him the right to remove it at the expiration of the term, upon oak planks laid about one foot under the ground. In 1856, however, he acquired the fee, and in 1870, he also became owner of the lot now owned by H., and held it for a year, when he conveyed it to E. H. from whom H. derived title. There was no evidence to shew that H. knew that the house was receiving more support from his land than it would have required if it had been constructed in the ordinary way.

Held, that owing to the unity of seizin of S., there had not been twenty years continuous enjoyment of the support as an easement; but that even if there had been, no such acquiescence in the use of the servient tenement had been shewn as to justify the presumption that an easement had been acquired by grant.

Held, also, that when S. sold H.'s lot, there was no implied reservation of the right of support for the house.

Held, also, reversing the judgment of the Queen's Bench, 44 U. C. R. 428, that under the circumstances there was no evidence of negligence in fact, and that the plaintiff was therefore not entitled to recover.

APPEAL from the Court of Queen's Bench discharging a rule *nisi* to enter a verdict for the defendant Houston, reported 44 U. C. R. 428. The pleadings and facts are fully stated there, and in the judgments on this appeal.

The case was argued on the 14th January, 1880 (*a*).

Robinson, Q. C., and *E. W. Scane*, for the appellants. The respondent claims that he is entitled to lateral support for his building from the appellant's land, on the grounds, (1) that there was twenty years enjoyment of the support as an easement; (2) that the appellant having owned both lots, this right was retained upon the severance as an implied grant or reservation. The law relating to the

(*a*) *Present*.—MOSS, C.J.A., PATTERSON, MORRISON, J.J.A. and OSLER, J.

right to lateral support is very fully discussed in *Angus v. Dalton*, L. R. 3 Q. B. D. 85, 4 Q. B. D. 162, which clearly shews that the old notion that the right to lateral support is acquired by twenty years user alone, is done away with. It is laid down there that you cannot acquire it without shewing, first, that the adjacent owner was capable of making a grant, and secondly, that he knew or had reason to know that the building was supported by his soil. Now it appears that this house was built by Smith when he had a ten years' lease of the land, the foundation wall being built on oak planks sunk a foot in the ground, so that he could without difficulty remove it when his lease expired, and the evidence shews that he intended to remove it. Under these circumstances there was nothing to show acquiescence on the part of the appellant, or to justify the presumption that there was a grant, even if there had been a user of twenty years of the support as an easement—which there was not, since in 1870, and before the expiration of the twenty years, there was a unity of ownership in the two tenements. It cannot be held that a right of support was reserved by implication when Smith conveyed to Higgins as, even if it were a continuous easement it was not apparent. Such a contention, however, is answered by the case of *Wheeldon v. Burrows*, L. R. 12 Ch. D. 31. See also *Harris v. Smith*, 40 U. C. R. 33. With such a foundation the house would clearly require more support from the appellant's land than it would have had it been constructed in the ordinary way; but there is nothing to shew that the owner of the adjacent lot was aware of this; nor to sustain the assertion that the land on which the house stood was made ground. If then there was no right to lateral support the appellant cannot be held to have been guilty of any actionable negligence at all in excavating up to the limit of his line. It is clear that he was not bound to give any notice to shore up the building: *Peyton v. Mayor of London*, 9 B. & C. 727; *Chadwick v. Trower*, 6 Bing. N. C. 1. The building did not fall for two days after the

land was excavated, and the respondent had therefore plenty of time to prop it up. There was thus contributory negligence: *Shearman & Redfield* on Negligence, 3rd ed., secs. 496, 497; *Wharton* on Negligence, 2nd ed., 929; *Lovell v. Howell*, L. R. 1 C. P. D. 164; *Brown v. Robins*, 4 H. & N. 186; *Mitchell v. Harper*, 4 C. P. 147; *Smith v. Thackerah*, L. R. 1 C. P. 566. The only remaining question is, whether Houston is liable. The work complained of was done contrary to the appellant's order, and in such a case the employer is not responsible: *Bower v. Peate*, L. R. 1 Q. B. D. 331; *Wheelhouse v. Darch*, 28 C. P. 269. The injury did not arise from doing anything he was employed to do, as Smith directed him not to go within four feet of the wall.

Boyd, Q. C., and *C. R. Atkinson*, for the respondents. Independently of the question of right to lateral support, the appellant was liable for the negligent and careless manner in which the excavation was made by those employed by him. It cannot be held that the appellant was not responsible for what Jones did, as he did not repudiate it, but on the contrary adopted his work and paid him for it, and he cannot now be heard to say that it was done without his sanction. The maxim "*Qui jactat per alium facit per se*," clearly applies: *Bower v. Peate*, L. R. 1 Q. B. D. 321; *Wheelhouse v. Darch*, 28 C. P. 269; *Barnes v. Ward*, 9 C. B. 412; *Wharton* on Negligence, 2nd ed., 929; *Smith's* L. C., 8th ed., 308. There is no question that the tenant is clearly entitled to maintain this action: *Foley v. Wyeth*, 2 Allen 134; *Farrand v. Marshall*, 21 Barb. 422. But it is submitted that under the circumstances of this case the right to lateral support for the building in question had been acquired by the acquiescence in the user of such support by the owner in fee of the adjacent lands for a period exceeding twenty years. It is argued that there was not continuous enjoyment during that period, as it was interrupted when Smith owned both lots; but we contend that the easement was not destroyed by the unity of possession, but was

merely suspended, and that it revived when Smith conveyed to Elizabeth Higgins: *Kerr v. Foster*, 3 Q. B. 588; *Ladyman v. Grave*, L. R. 6 Chy. 768; *Partridge v. Scott*, 3 M. & W. 228; *Kelk v. Pearson*, L. R. 6 Ch. 809. There can be no question that when Smith conveyed to her he impliedly reserved the right to lateral support, as it was a necessary easement, without which the house would fall, and the authorities conclusively establish that in such a case it would be reserved by implication: *Wharton* on Negligence, sec. 929; *Washburn* on Easements, p. 526; *Richards v. Rose*, 9 Ex 218; *City of Quincy v. Jones*, 76 Ill. 241; *Caledonia R. W. Co. v. Sproat*, 2 McQ. H. L. 449; *Humphries v. Brogden*, 12 Q. B. 739; *Lampman v. Milks*, 21 N. Y. 507, 514; *Siddons v. Short*, L. R. 2 C. P. D. 572; *Birmingham v. Allen*, L. R. 6 Ch. D. 284; *Harris v. Smith*, 40 U. C. R. 33; *North Eastern R. W. Co. v. Elliott*, 2 DeG. F. & J. 430; *Dugdale v. Robertson*, 3 K. & J. 695. Moreover the evidence shews that the appellant agreed with his codefendants to run traverses under the building and put in piers to support the adjacent wall before depriving it of its natural support, and to erect a new party wall. This undertaking clearly amounted to an admission of, or at all events an acquiescence in, the right to lateral support, and the appellant ought not now to be allowed to dispute it. At any rate he thereby impliedly agreed to protect the respondent from any loss, and independently of the question of right to support or negligence, is liable for the damages found.

June 30, 1880. PATTERSON, J.A.—The plaintiff, who seeks to recover damages sustained by reason of the falling of the house where he carried on the business of harness maker, occupied the house as tenant of Smith. Smith had built the house in 1854, when he was himself tenant from year to year of the land, and two years later he bought the land in fee. He built upon oak planks laid, as a foundation, about one foot under the surface of the ground, and built his west wall up to or within a few inches of the

extremity of his land, where it adjoined the land which now belongs to the defendant Houston. In May or June, 1870, Higgins, who then owned the Houston lot, conveyed it in fee to Smith, who made a mortgage of it to one Simonton in July, 1870, and on the 3rd of May, 1871, made a conveyance in fee to the wife of Higgins. Smith, who seemed from his evidence to have an indistinct recollection of the transaction, intimated that the main object of the conveyance to him was that he might make the mortgage, and might convey to Mrs. Higgins, but that he had a small beneficial interest in the land because Higgins owed him money. In 1876 Houston, who derived title from Mrs. Higgins, excavated his lot for a cellar, preparatory to building upon it; and the excavation being deeper than the foundation plank of Smith's house, the foundation subsided, and the west wall of the house fell. I say nothing at present of the details which have to be referred to on the subject of negligence.

The first question is, had the plaintiff a right to the lateral support of Houston's land?

The recent discussion of the law upon this subject in the case of *Angus v. Dalton*, L. R. 3 Q. B. D. 85, 4 Q. B. D. 162, resulting in somewhat remarkable differences of opinion among the Judges who heard the case both in the Queen's Bench Division and the Court of Appeal, has shewn that in some particulars the law must be considered as not yet satisfactorily settled; a state in which it must remain, until the case shall have been disposed of in the House of Lords.

I do not think, however, that upon any question material to the decision of this case any difference of opinion existed. I take the law upon which the learned Judges were all agreed, and which the authorities concur in supporting, to be correctly stated in the head note of the report in the Court of Appeal, which is in these words: "The right to the support of a building by the adjacent soil of an adjacent owner is not a natural right of property; it is an easement that may be acquired by prescription from the

time of legal memory, or by grant express or implied; but it is not an easement within the Prescription Act 2 & 3 Wm IV, ch. 71, [R. S. O. ch. 108, sec. 35]. It may also be acquired by the circumstance that the building has stood for twenty years, if during that period the owner of the adjacent soil knew or might have known that the building was thereby supported, and if he was capable of making a grant."

The majority in the Court of Appeal consisted of the Lords Justices Cotton and Thesiger, who, while overruling the judgment of Cockburn, C. J., and Mellor, J., who had formed the majority in the Queen's Bench Division, did not fully adopt the opinions of Lush, J., the dissenting Judge in that Court. And Brett, L. J., who dissented in the Court of Appeal, did so upon grounds less decidedly opposed to the claim of prescription than those enunciated by Cockburn, C. J., and concurred in by Mellor, J.

The opinions of the three Judges last named, where they diverged from the others, did so in a direction adverse to the plaintiff before us, who cannot, therefore, claim to have the law stated in terms more favourable to his contention than those which I have quoted.

Testing the plaintiff's right by this doctrine, one enquiry must be, whether the owner of the adjacent land knew, or might have known, that the building was receiving from his land that kind and extent of support which it is now shewn to have been receiving.

We shall better apprehend the force of the facts which bear upon this enquiry, by referring to some of the language of the two Lords Justices whose opinions prevailed in *Angus v. Dalton*. Thesiger, L. J., had quoted from several judgments in which the knowledge of the servient owner was spoken of, and he said (at p. 181): "But the question still remains, whether the right of support acquired by user is an absolute one attaching itself to any house which has stood the requisite time, or whether any and what limitation is to be put upon the right in this respect. I have already incidentally touched upon this

question, and its answer, as it appears to me, is to be found in a reference again to the rule, that a user which is secret raises no presumption of acquiescence on the part of the servient owner, and, as a consequence, no presumption of right in the dominant. If therefore, a particular house were by reason of some intrinsic or extrinsic weakness of a serious character, or owing to some unreasonable method of construction, to require an amount of support greater than houses of its kind usually require, I think that the mere enjoyment in fact of that extra support would not raise the presumption of acquiescence on the part of the servient owner, or create after twenty years' user a right to that extra support. If, on the other hand, a house is of ordinary stability and of reasonable construction, I think it equally clear that the owner of the adjacent soil must be assumed to know the amount of lateral support which such a house must need, and is bound to afford it as a matter of right after the house has in fact enjoyed it for twenty years." And Cotton, L. J., said (p. 187): "Enjoyment does not confer a right, unless the enjoyment has been open. Twenty years' enjoyment of lateral support only gives a right to such support as the actual construction of the house, if known to the adjoining owner, requires, or to such support as is reasonably required by a house of the dimensions and construction known or apparent to the adjoining owner."

It is obvious that a house built, as this one was, almost on the surface of the ground, must have required an amount of lateral support which would not have been required if it had had such a foundation as is usual in houses of its dimensions.

Smith, in his evidence, tells us that the verbal lease for ten years, under which he built the house, gave him the right to remove the house at the end of his term. This may perhaps account for the way it was built, although Smith says it was fashionable at the time to build houses in that way. But whatever may have led to its being so constructed, there is nothing to indicate that the servient

owner had any knowledge, or means of knowledge, that the extra support was being afforded by his land.

Upon this ground, it is my opinion, as it was also the opinion of all the Judges in the Court below, if I correctly apprehend their judgments, that no such acquiescence in the user of the servient tenement is shown as to justify the presumption at the end of twenty years user that the dominant owner had acquired the easement by grant.

But there was not twenty years continuous enjoyment of the support as an easement, because in 1870 the ownership in fee of both tenements was united in Smith. Only sixteen years had then passed since the house was built. There was then no grant actual or presumed; and after the severance only five or six years elapsed.

It was argued by Mr. Boyd, for the plaintiff, that the two periods were cumulative, the easement being only suspended during the unity of ownership, and reviving upon the severance. I cannot see my way to that conclusion. In *Ladyman v. Grave*, L. R. 6 Chy. 768, to which Mr. Boyd referred, it was laid down by Lord Hatherley, in reference to the Prescription Act, that "the accruing right to the easement of light, as in the case of all other easements, is suspended, but only suspended during the union of the possession. So that if it had been shewn that the enjoyment had lasted for fifteen years and upwards, and then there had been an interruption by unity of possession, and then the enjoyment had lasted for five years more without the unity of possession, in such a case an enjoyment of twenty years could have been pleaded;" adding, that the interruption (if such it may be called) by the unity of possession, is not an interruption in the sense indicated by the statute, which means an adverse interruption.

In *Aynsley v. Glover*, L. R. 10 Chy. 283, it was held that a prescriptive title to light, acquired by enjoyment from time immemorial, was not destroyed by the circumstance that for many years, and almost to the time of bringing that suit, there had been unity of possession, there being no evidence that there ever was unity of title.

Assuming the law to have been correctly laid down in *Ladyman v. Grave*, which I venture to think may, as a general proposition, be open to question, it would not govern this case, which is not under the statute, and in which there was the unity of title. The necessity for unity of *seizin* to the extinguishment of an easement, and the effect of unity as in all cases causing the extinguishment, are pointed out in *Goddard on Easements*, at pp. 307, &c. The defendant Houston derives his title from Smith, and the question really is, whether Smith can, in derogation of his grant, assert the existence at the time he made it of any interest or easement remaining in or reserved by implication to himself. In *Gale on Easements*, in the edition of 1876, published after the decision of *Ladyman v. Grave*, this passage is retained as it appeared in the former editions, (p. 584): "It will, however, be found that the classes of easements with respect to which this revivor is supposed to take place, exactly correspond with those already considered, as being acquired by the implied grant resulting either from the disposition of the owner of the two tenements, or from the easement being of necessity."

I think the question involved in the argument by which the effect of the unity of title is attempted to be displaced, is the same raised by another contention advanced for the plaintiff, namely, that on the doctrine of *Pyer v. Carter*, 1 H & N. 916, Smith reserved by implication the right to the support of the land which he conveyed to Mrs. Higgins, and that Houston took it subject to that reservation.

It is unnecessary on this point to say more than that if *Pyer v. Carter* could still, after the decision in *Wheeldon v. Burrows*, L. R. 12 Ch. D. 31, be regarded as law, this easement would not come within the rule it established, because it was not apparent, though it may have been continuous.

The judgment of the majority of the Court below proceeded upon the ground of negligence in the defendant in excavating his land. The Chief Justice refers to author-

ities which undoubtedly establish that a person doing on his own land what he has a legal right to do, may nevertheless render himself liable to his neighbours, if by negligence in the mode of doing it he occasions injury to his neighbour; and that the known state of the neighbour's premises may call for a greater degree of care in one case than in another.

Mr. Justice Armour, who tried the case without a jury, states that he formed the opinion at the trial, from what was proved and appeared before him, that Houston had not used that ordinary care and skill which he was bound to exercise in order to avoid the injury which was occasioned to the plaintiff; and that he found as a fact that the injury was caused to the plaintiff by his neglect to do so. Neither of those learned Judges has pointed out the particular sin of omission or commission of which he considered Houston to have been guilty. They do not say what, in their opinion, he did or omitted to do contrary to his duty. I understand that he dug out his lot for a cellar, not digging quite up to the plaintiff's wall, though coming in some places within a few inches of the line between the lots; that no accident happened in the course of the excavation; and that after the excavation was completed to the extent it reached, the plaintiff's house was unaffected by it, and that it remained in that state for two days—at least it was two days before the building fell, and before the fall there had intervened during the night a shower of rain. Taking the law to have given Houston a right to excavate his land, and to have given the plaintiff no right to the support of that land for his house, I am unable to see in the mere fact of the removal of the land any evidence of negligence. I think it is not a question of negligence at all; but that in conceding that Houston could properly be found guilty of negligence when no act or omission can be singled out and pronounced blamable, we are really deciding that after all the plaintiff was entitled to the support which we have agreed in negating his right to receive.

I agree with Mr. Justice Cameron in the views expressed by him on the point, and think that we should allow this appeal, with costs.

OSLER, J.—Upon the evidence I think it must be held that the excavation on the defendant's soil would have occasioned no damage to the plaintiff's land in its natural state unweighted by the building. This was the conclusion arrived at by the Court below, in the absence of any finding as to the fact by the learned Judge who tried the cause, and it was not argued to the contrary before us.

If the plaintiff had not acquired the right to have his building supported by the adjacent and subjacent soil, the defendant Houston's liability for negligence in excavating his own land must have relation to his duty in reference to the plaintiff's land in its natural state. He was not bound to shore up the plaintiff's building, or to give notice to the plaintiff that it might require protection.

If the building was not entitled to the lateral support of the adjoining land, and the excavation on the defendant's land would not have caused injuries to the plaintiff's land in its natural state, I agree with the opinion of Mr. Justice Cameron in the Court below, that the defendant was not guilty of actionable negligence in the execution of the work. If the defendant's liability be put, as it appears to be, upon the existence of negligence in fact—that is, that the work was done in a negligent and imprudent manner, and so as to occasion greater risk to the plaintiff's buildings than would have been incurred in the ordinary course of doing the work, assuming that the defendant might be rendered liable for negligence of that description, and that he could not excavate up to the extreme limit of his own land without taking some precautions against injury to a building not entitled to support from such land—I think, with great respect for those from whom I differ, that the evidence does not shew that such negligence existed.

It is said that the foundation of the plaintiff's wall

rested on the "made ground," which I understand to mean soil which had been filled in, and would, therefore, probably have less cohesion than soil which had never been disturbed. But in the first place it does not appear that the defendant knew or could have known this until after the wall had fallen; and secondly, there is quite as much evidence that the foundation rested on the original soil, as that it rested on made ground. The only witness who deposed to the latter being the case was William Smith, the person who took the contract for propping up the defendant's house, while the defendants Houston and John Smith, swore to the contrary, and the latter said that he himself had dug the foundation of the old building, and that he had dug until he came to good solid clay. There was nothing else peculiar about the foundation wall, except that it rested upon a three-inch oak plank forty feet long and sixteen inches wide, and there was no evidence that this would make the foundation weaker, but the contrary. If it did have that effect there is no evidence that the defendant Houston knew of the manner in which the wall had been constructed or was supported.

The plaintiff is thus, in my opinion, driven to maintain that he had acquired an easement for the support of his building by the adjacent soil of the defendant Houston's land, or that when Smith sold the defendant's lot to Higgins there was an implied reservation of the right of support for his own house. On both these points the opinion of the Court below was adverse to him, and it is unnecessary for me to add anything to what my brother Patterson has said upon the subject, as I agree with him that no easement or right of lateral support had been acquired, and that there was no implied reservation of such on the conveyance to Higgins.

MOSS, C. J. A., and MORRISON, J. A., concurred.

Appeal allowed.

IN RE BOWES, INSOLVENTS.

Insolvent Act of 1875—Payment of taxes.

Upon the insolvency of the lessees, there were goods upon the premises belonging to them, and other goods stored with them, sufficient to pay the taxes in arrear; and a warrant being issued, the bailiff notified the assignee, but forbore to distrain on the assignee's promise to pay, which promise was confirmed by the inspectors of the estate. The goods having been afterwards removed, an order was made directing the assignee to pay the taxes forthwith, with all costs.

APPEAL from the County Court of York.

In this case the corporation of the city of Toronto and Mr. John Boulton presented a petition to the Judge of the County Court, representing that the insolvents were lessees, at a certain yearly rent and taxes, of certain premises in Toronto: that before the insolvency a large amount was due for taxes, and that after the insolvency a warrant was issued by the city to levy the same: that at the time of the issue of the attachment and the delivery of the warrant there were goods and chattels of the insolvents, as also property of others, stored or warehoused upon the premises, sufficient to pay the rent and taxes: that the bailiff thereupon notified the assignee, and requested him to pay the taxes: that he did not distrain in consequence of a promise by the assignee to pay them, which promise was subsequently confirmed by the inspectors: that the assignee had ample funds, but had not paid; and prayed for an order on the assignee to pay \$268.68, the amount due.

It appeared from the depositions that the attachment issued on the 24th December, 1878: that the warrant issued on the 10th January, 1879: that the goods belonging to the insolvents were not sufficient to pay the arrears of rent: that other goods belonging to third parties, subject to storage, were delivered by the assignee to the owners on payment of the storage, amounting to \$280; and that all the goods were removed from the premises on or before the 28th January, 1879, when possession was given up to the landlord.

The learned Judge of the County Court dismissed the petition.

The petitioners appealed.

The case was argued on the 15th of June, 1880, before Burton, J.A., sitting in insolvency.

MacLennan, Q.C., for appellants. The goods, though in storage, were in the hands of the assignee, and the bailiff could not distrain. When the bailiff claimed the taxes from the assignee there were goods on the premises to a value beyond what would, if sold, have paid the taxes. Some of the goods were the property of the insolvents and others were subject to a lien for storage, and the assignee could have collected the storage. By section 125 of the Insolvent Act the bailiff's remedy by distress was converted into a remedy by application to the County Judge. The taxes being recoverable by distress were a preferential lien: R. S. O. ch. 180, sec. 93; *Re McCracken*, 4 App. R. 483; *Barclay v. Sutton*, 7 P. R. 14.

Foster, for respondents. The insolvents were not assessed, but their landlord, Boulton, was, and he has no privilege in respect of taxes which he has not paid. As between him and the insolvent the taxes could only rank as an ordinary debt. The corporation of Toronto is not a creditor, and therefore cannot take advantage of the summary jurisdiction clause: *Re Parsons*, 4 App. 179; *Re Lundy Granite Co.*, 6 L. R. Ch. App. 462. The corporation has no lien on the property, no actual levy having been made. The goods stood exposed to a possibility of distress. The right to distrain is a remedy, not a lien: *Buckley v. Taylor*, 2 T. R. 600. Though assessed taxes may be a lien on realty they are not on personal property. Taxes are not liens unless made so by statute: R. S. O. ch. 180, sec. 105; *Dillon on Corporations*, 659. The statutory lien arises out of contract, and no contract existed between the corporation and the insolvents: *McGuirk v. McLeod*, 2 Pugsley 323. The Act gives a lien for rent but nothing is said about taxes. In the English and American Acts they are expressly provided

for. The mere notice by the bailiff to the assignee of the existence of the warrant was of no avail: *Nash v. Dickenson*, L. R. 2 C. P. 252; *Ex parte Descharmes*, 1 Atk. 103; *Briggs v. Sowry*, 8 M. & W. 729; *Adshead v. Grant*, 4 P. R. 121. A warrant binds goods only from the time of seizure: *Brassey v. Dawson*, 2 Str. 977; and here there was no seizure. When the goods left the premises any lien ceased. As against the assignee the remedy, if any, can prevail as to those goods only that actually belonged to the insolvents. The warrant by its terms directed seizure of the insolvents' goods for a debt due by the insolvents, but at that time the insolvents had no goods—they belonged to their assignee. There being no debt so far as the corporation was concerned, the warrant is invalid: *Austin v. Whitehead*, 6 T. R. 436. Besides, there was no prior demand of the taxes from the person who ought to pay, that is, the person assessed: *Smith v. Shaw*, 8 C. L. J. 297. The resolution of the inspectors authorizing payment was afterwards rescinded.

MacIennan, Q. C., in reply. There is no difference between taxes and rent as regards the remedy by distress, and therefore a lien existed. The Act prohibits distress in each case, and substitutes the summary remedy.

June 30, 1880. BURTON J.A.—It was contended on the part of the appellants that the taxes, being recoverable by distress of anything upon the demised premises, stand in the same position as rent, and that the assignee being rightfully in possession of the property by reason of the lien, the petitioners' only course was, to apply to the Judge; or that that course, at all events, was open to them.

Before the insolvency these goods were liable to be distrained for the taxes assessed upon the premises, the owners having their remedy over against the party assessed; and they would still be so liable after the insolvency, unless, by reason of the special property which the insolvents had in them in virtue of the lien for storage, that right is interfered with, and the collector driven to his remedy by petition under the 125th section.

According to the interpretation which the Courts have placed upon that section, I am of opinion that the goods in question being rightfully in possession of the insolvents under a valid claim, the collector was confined to that remedy ; and his right being thus interfered with, the case is brought within the principle of the decisions respecting rent.

The lien was an asset of the estate available for creditors, but the corporation, notwithstanding this, could have sold the same goods. The owners of the goods could not, however, as between themselves and the estate, be compelled to meet both demands—the taxes and the storage. If, in order to obtain possession of these goods from the collector, they were compelled to pay a sum equal to or in excess of the storage, they could scarcely be compelled also to pay the storage ; and if, upon insolvency intervening, the storage dues come into the hands of the assignee, there would seem to be no reason why they should not be applied to the satisfaction of a claim which might otherwise have been enforced from the goods themselves.

But, upon the facts deposed to or admitted in this case, I can see no reason why the assignee should not have been compelled to carry out his engagement deliberately entered into and confirmed by the inspectors, who, under the terms of the statute, were appointed by the creditors to superintend and direct his proceedings in the winding up and management of the estate.

The collector either had the right to distrain, or he had not. If he had, then his forbearance to act upon his right was a sufficient consideration for this promise of the assignee to pay the taxes from the moneys of the estate. If he had not, it was because he was restrained from doing so by the 125th section, and was confined to the remedy given by it. In either case the promise was made and confirmed by the parties authorized to represent the creditors, and no reason has been shewn why it should not be carried out.

I have a strong impression that upon the facts disclosed

the assignee would be personally liable upon his undertaking, and it is perhaps a fortunate thing for him that I can see my way to the allowance of this appeal.

I think that the proper order for the learned Judge of the County Court to have made, would have been to have directed the assignee to pay the taxes to the amount of \$268.68, together with the costs of the application.

Mr. Boulton was not, so far as I can see, a necessary or a proper party to the application. Had he paid the amount I suppose he could only have ranked as an ordinary creditor for the amount so paid. The corporation are in a different position. I think, as to him, the appeal should be dismissed, without costs. I may, however, treat his joining in the petition as an assent to the appropriation of this amount to the taxes. Whether there were, besides, sufficient distrainable goods upon the premises to constitute the whole of his claim for rent, a privileged claim, does not arise on these proceedings:

The conduct of the assignee appears, so far as one can judge from these papers, to have been very unwarrantable, and I have, therefore, no compunction in granting the appeal, with costs.

The order will be, that the assignee do forthwith pay to the collector of the city of Toronto the sum of \$268.68, together with the costs of the application in the Insolvent Court, and the costs of this appeal.

Appeal allowed.

IN RE GALBRAITH AND CHRISTIE.

Insolvent Act of 1875, sec. 65—Discharge under.

Held, that the insolvents were not entitled to a discharge under section 65 of the Insolvent Act of 1875, as the facts set out below did not shew that their failure to pay a dividend of fifty cents in the dollar was caused by circumstances arising more than one month after the mailing of the declaration of insolvency, for which they could not be justly held responsible within the meaning of the third proviso to that section.

Quære, as to the effect of neglecting to mail such declaration to each creditor, as required by that section.

APPEAL from the County Court of York.

This was a petition by David Galbraith and Thomas Christie, trading as co-partners, under the name of Galbraith, Christie & Co., praying for an absolute discharge under the 65th section of the Insolvent Act of 1875, on grounds which were set out in thier petition.

The petitioners stated that they informed their bankers, the Consolidated Bank of Canada, early in the month of January, 1879, that they were unable to meet their liabilities, and requested the Bank to assist them: that the Bank could not give them the required assistance, and that in compliance with a demand served upon them by the Bank, they made an assignment in insolvency on the 11th of February, following: that their liabilities amounted to \$220,132.32, of which \$101,030.83 was indirect liability to the Bank, of which sum \$82,500 became a direct liability: that the direct and indirect liabilities of the said Galbraith to his separate creditors amounted to \$112.665. that the separate creditors were paid in full, and that the joint creditors sold his interest in the surplus of his separate estate for one thousand dollars, which sum was divided amongst the joint creditors: that the assets of the said Christie realized the sum of \$1,750, which was also divided amongst the joint creditors: that the final dividend was declared on the 14th November, 1879, and that the joint creditors had been paid 17½ cents in the dollar on their respective claims: that for four weeks prior to their

being placed in insolvency they sustained large losses from the failure of parties largely indebted to them, who would not have suspended if they had been able to assist them, but which they were unable to do, as they could not themselves get assistance from the bank : that their creditors had manifested every confidence in them, and had not examined them as to the state of their affairs, being persuaded that they had acted honestly in the matter : that with five exceptions all their creditors had executed a deed of discharge : that in order to obtain a discharge under the Act by consent, it was absolutely necessary that the bank should execute the discharge, as their claim amounted to \$82,500, and that the directors of the said bank, which was in liquidation, were unwilling to execute the discharge, as the said Galbraith had been a director of the Bank, and they were afraid that they would lay themselves open to observation by the shareholders if they gave a discharge to any one who had been a director : that the said Galbraith had lost \$25,000 by the failure of the bank, but for which loss his estate would have been benefited to that amount : that the Bank were willing to sign a release for the said Christie, but that inasmuch as the Bank had intimated their intention not to oppose the application of the petitioners for their discharge, the said Christie had not availed himself of their consent to discharge him : that although a dividend of fifty cents in the dollar had not been paid to the joint estate, such a dividend might have been paid but for the reasons already stated, or if they had been enabled to execute a voluntary assignment when they first informed the Bank of their difficulties, because a large number of parties who were largely indebted to them might have been sustained in their commercial credit, and not driven into insolvency ; and if the petitioners had been allowed to work out their estate their remaining assets would have realized more than by a sale in insolvency, and their separate estates would have realized a large surplus which would have been available for paying the joint creditors : that they had obtained the required

proportion of their creditors as to number, and but for the large claim of the Bank they would also have the necessary proportion as to value: that the report of the assignee shewed that they had been just in all their dealings, and that their insolvency resulted from losses for which they were not responsible.

It appeared that the insolvents had not, in accordance with a proviso to Section 65 of the Insolvent Act of 1875, prior to the institution of the proceedings in insolvency, mailed prepaid and registered a declaration acknowledging their insolvency, but it was proved that all the creditors had executed their discharge with the exception of the Bank and four other creditors, who had had actual notice.

The learned Judge held that it was a condition precedent, under the 65th Section, that a declaration of insolvency should be mailed to each creditor, and this not having been proved to have been done, he had no power to grant the discharge, although he thought that under the circumstances, the insolvents, but for this omission, were entitled to an absolute discharge.

The petitioners appealed.

The case was argued before Burton, J.A., sitting in insolvency on the 15th June, 1880

Dr. *Snelling* for the appellants, contended that the mailing of the declaration in insolvency had been under the circumstances waived, and that it clearly appeared from the facts stated in the petition that a dividend of fifty cents on the dollar would have been paid but for reasons for which the insolvents could not be held responsible.

June 30th, 1880. BURTON, J. A.—In this case I agree in the conclusion arrived at by the learned Judge, although I think he has taken a rather narrow view of the language of the proviso of the 65th section, in holding it to be a condition that the declaration of insolvency referred to in that proviso should, in all cases, be sent by post, prepaid and registered. What is meant, no doubt, is, that the insolvent shall not be under the necessity of serving the declaration upon each creditor personally, but that a service may be

effected by letter, provided only that it is mailed to the proper address, prepaid and registered.

I do not think it necessary to express any opinion as to whether, in a case where the required declaration of acknowledgment of insolvency has been served upon one creditor and all the other creditors consent to a discharge, thereby waiving the requirement of the statute so far as they are concerned, it would be competent to the Judge to grant a discharge in a case where the dividend amounted to less than fifty cents in the dollar, because I am of opinion that the insolvents have failed to bring themselves within the third of the conditions set forth in the proviso, without the establishment of which by proof the Judge is prohibited from granting the discharge.

Assuming for the moment that the delivery of such a declaration as the Act requires had been proved, and that no proceedings in insolvency were taken within the prescribed period, the insolvents have yet to establish that a dividend of fifty cents would have been paid but for circumstances for which they cannot justly be held responsible, arising more than one month after the mailing of such declaration.

The Act gave the creditors a month after the posting of the declaration to act upon it by instituting proceedings in insolvency. If they fail to do so within that period, and after that time circumstances for which the insolvent cannot justly be held responsible arise, which have the effect of reducing the dividend below the sum fixed by the Master, the Judge is still empowered to grant the discharge.

The exact date on which the statement was delivered to the bank does not appear, but they must have instituted proceedings in insolvency, if not within the month, very shortly afterwards; and I see nothing in the evidence which would have warranted the Judge in holding that the contingency had occurred which alone would have warranted his granting the discharge. On the contrary, I see that very heavy losses were incurred in the interval.

The insolvents do shew, and it is most probable that they are correct in their opinion, that if they could have obtained the requisite assistance, or could have been allowed to wind up the estate themselves, more would have been realized than was realized under the insolvency proceedings; and that many of their customers who might, by a little assistance, have worked through, were, by reason of their insolvency, driven to suspend, and losses have thus occurred. But these are a description of losses which are incident to all insolvencies.

I share in the regret expressed by the learned Judge, that I am unable to afford any relief to these insolvents, as their conduct appears to have been such as to have met with the approval of all their creditors and of the assignee, whose duty it was to investigate their affairs and report upon them. It is possible that they may be enabled, at a meeting of the shareholders of the bank, which is their principal creditor, to procure the passing of a resolution, which the liquidators may deem a sufficient authority for them to consent, as the other creditors have done, to their discharge; but as matters now stand, I am clear that the Judge had no power to interfere, and I must, therefore, reluctantly dismiss this appeal. No one attended to oppose, and there will, therefore, be no costs..

Appeal dismissed.

McLAREN V. CALDWELL ET AL.

Interlocutory injunction—Irreparable injury—Balance of convenience.

The plaintiff, who claimed the exclusive user of certain streams flowing through his lands, which right the defendants denied, obtained an interlocutory injunction restraining the defendants from using his improvements thereon for floating down their logs, upon the usual undertaking to pay any damages sustained thereby.

Held, reversing the order of PROUDFOOT, V. C., ARMOUR, J., dissenting, that the plaintiff was not entitled to an interlocutory injunction, as it was not shewn that irremediable damage would result from refusing it, or that the balance of inconvenience was in his favour.

Remarks as to the general principles on which interlocutory injunctions should be granted or refused.

THIS was an appeal from a decree of Proudfoot, V.C., granting an interlocutory injunction restraining, until the hearing of the cause, the defendants and their agents from using the improvements owned or constructed by the plaintiff on the branches of the Mississippi River, known as Louse and Buckshot Creeks, for floating down his timber and logs, on the plaintiff giving the usual undertaking to pay damages, in case the Court should be of opinion that the defendants had sustained any by reason of the order.

The material facts are stated in the judgment.

The case was argued on the 28th of May, 1880 (a).

Bethune, Q.C., and *C. Moss*, for the appellants. We complain that the facts in this case did not warrant the Vice-Chancellor in granting an interlocutory injunction. His Lordship held that the streams in question were not floatable; but it was proved that at certain periods of the year saw logs were floated down. The evidence in support of the plaintiff's contention, that the streams were not floatable, consisted principally of matters of opinion, with the exception of the testimony of the witness Skead, and we had no opportunity of cross-examining him. No one can read the evidence without coming to the conclusion

(a) *Present*.—BURTON, PATTERSON, and MORRISON, JJ.A., and ARMOUR, J.

that the streams were floatable within the meaning of the Statute R. S. O., ch., 115. It is true that it was held in *Boale v. Dickson*, 13 C. P. 337, and followed in *Whelan v. McLachlan*, 16 C. P. 103, and *McLaren v. Buck*, 26 C. P. 539, that the right given by the statute only extends to such streams as in their natural state, without improvements, during freshets are capable of running timber down, but it is submitted upon the reason of the thing, as well as upon authority, that the mere fact that there are obstructions in a stream which may be removed by improvements, does not prevent it from coming within chapter 115; and we submit that the decision is bad law and should be overruled. This point was taken in *The Montello*, 20 Wall. 430, and it would seem from that decision that the construction placed upon the Act in *Boale v. Dickson* was too limited. The plaintiff's demand for an injunction is based purely on the ground that he has the legal right to the user of the streams. But this is not at all established. It is quite clear that it is a case in which an injunction should not be granted till the hearing. The balance of convenience is strongly in favour of the defendants, and no case of irreparable mischief, *i. e.*, damage which cannot be estimated, has been made out here, and the authorities shew that an injunction will be refused unless this is shewn: *Joyce on Injunctions*, 218, edition of 1877; *High on Injunctions*, secs. 458, 462; *Doherty v. Allman*, L. R. 3 App. Cas. 709; *Attorney-General v. Cambridge Gas Co.*, L. R. 4 Ch. 71; *White v. Cohen*, 1 Drewry 312; *Wells v. Attborough*, 19 W. R. 465; *Shrewsbury and Chester v. The Shrewsbury and Birmingham R. W. Co.*, 1 Sim. N.S. 410; *Kerr on Injunctions* 171, ed. of 1878; *New York Printing Co. v. Fitch*, 1 Paige 98; *Livingstone v. Livingstone*, 6 Johns. 497; *Grand Trunk R. W. Co. v. Credit Valley R. W. Co.*, 26 Gr. 572; *Masson v. Grand Junction. R. W. Co.*, 26 Gr. 286; *Lockwood v. London and North Western R. W. Co.*, 19 L. T. N. S. 68. While the granting of this injunction will be of no benefit to the plaintiff, great injury will be done to the defendants, as the whole season's opera-

tions will be frustrated and their logs will be destroyed. It is clear that any injury which the plaintiff may suffer can be sufficiently compensated for by damages.

Blake, Q.C., and *A. R. Creelman*, for the respondent. This Court should not interfere with the discretion of the learned Vice-Chancellor, who, after an elaborate discussion of the case, came to the conclusion that the plaintiff was entitled to an interlocutory injunction. The evidence proves beyond a doubt that the streams were not, in their natural state, floatable; and that they were only made so by the expenditure of a large amount of money by the plaintiff in making improvements. Under these circumstances, it is well settled by *Boale v. Dickson*, 13 C. P. 337, that the streams do not come within R. S. O., ch. 115; and after having been acquiesced in so long that decision should not be overruled by this Court. The appellants cannot be injured by the injunction, as it was only granted on the undertaking of the respondent to pay any damages which they might sustain. It is most unjust that the appellants should be permitted to take advantage of the improvements, by which alone their logs can be floated down the stream; and the injury which the evidence shews the respondent will sustain in his business is sufficiently great to entitle him to an injunction. The term "irreparable" has been variously modified in the later cases, in some of which it is referred to as "something, the loss of which you cannot easily define." This definition is peculiarly applicable to this case. *Goodson v. Richardson*, L. R. 9 Ch. 221, which is a case in many respects similar to the one now under discussion, is a strong authority to shew that the injunction was properly granted. This is not a case of temporarily passing over a man's land, but a designed, settled, and deliberate series of trespasses. The respondent's right, which is founded on property, has been wantonly invaded, and he is justified in asking for the assistance of a Court of Equity. They also cited *Lowndes v. Bettle*, 33 L. J. Chy. 451.

June 2, 1880. BURTON, J.A.—The discretion brought under review is not to be lightly interfered with, but is nevertheless to be exercised in accordance with established principles of law and equity, and unless we can be satisfied that this has been lost sight of in making the order complained of, we have no right to interfere.

What is contended here is, that an injunction will not be granted, until the right is determined, unless it is shewn either that the trespasser is insolvent, or the injury irreparable, and destructive to the plaintiff's estate, and such as calls for immediate relief.

The interference of Courts of Equity by injunction in cases of mere trespass is comparatively of modern origin, and they have gradually enlarged their jurisdiction in such cases, but they do now constantly exercise the right if the trespass will be attended with irreparable mischief, or if from the irresponsibility of the defendant, or otherwise, the plaintiff cannot obtain adequate relief at law, and the case referred to by the learned counsel for the plaintiff of *Goodson v. Richardson*, L. R. 9 Ch. 221, clearly establishes that at the hearing a perpetual injunction would be granted in a case of this nature, if the plaintiff's right be then established.

There the right of the plaintiff was admitted, and the act complained of was a continuing trespass, and the Court refused to listen to the contention that the plaintiff should be allowed to seek his remedy in another Court, and then, after succeeding in one or more actions at law, to come back to the Court of Equity, and obtain a perpetual injunction on account of repeated vexations and repeated actions; but the plaintiff's title to the property being established, the Court protected him by an injunction in the full enjoyment of it, and the reasons given by the Court in that case would apply with great force to the granting of an injunction here at the hearing. "With respect," says the Lord Chancellor at p. 224 "to the suggested absence of value of the land in its present situation, it is enough to say that the very fact that no interference of this kind can lawfully take place with-

out his consent, and without a bargain with him, gives his interest in this land, even in a pecuniary point of view, precisely the value which that power of veto upon its use creates, when such use is to any other person desirable, and an object sought to be obtained."

That case has also other features in common with the case under discussion. The parties here are rivals in business. There the person laying the pipes, did so for the purpose of making a profit of a trade which he proposed to set up in rivalry to one which the owner of the land upon which he was committing the trespass was interested in; and the plaintiff here might well say—you are at liberty to compete with me in the lumber business in any lawful manner, but you are not at liberty to use the streams which have been made floatable by my expenditure, without my consent, and I forbid you doing so. See also, *Krehl v. Burrell*, L. R. 7 Ch. D. 551, as to interfering by injunction, instead of leaving the party to seek damages at law.

It is clear, then, that at the present time Courts of Equity would not leave the plaintiff to his remedy at law, but would, on the establishment of his right, grant a perpetual injunction. But the point to be considered here is, whether, whilst the right of the plaintiff is contested, the learned Vice Chancellor arrived at the proper conclusion, bearing in mind the well settled and established rules of Equity in reference to the granting of injunctions previously to the hearing.

The rule has been very concisely laid down in *Cory v. Yarmouth and Norwich R. W. Co.*, 3 Ha. 593, that where the legal right is not sufficiently clear to enable the Court to form an opinion, it will generally be governed, in deciding an application for a preliminary injunction, by considerations of the relative convenience and inconvenience which may result to the parties from granting or withholding the writ; and where, upon balancing such considerations, it is apparent that the act complained of is likely to result in irreparable injury to the complainant, and the balance of inconvenience preponderates in his favour, the injunction will be

granted. But where, upon the other hand, it appears that greater danger is likely to result from granting than from withholding the relief, or where the inconvenience seems to be equally divided as between the parties, the injunction will be refused.

Where a clear case of irreparable injury is shewn as likely to result to complainant, unless the injunction is granted, and it does not appear that the issuing of the writ will work any such injury to defendant, the relief will be granted.

The same rule appears to be acted upon also in the Courts of the United States. In *Jones v. City of Newark*, 3 Stockton 457, the Chancellor laid down the rule that an injunction ought not to issue where the benefit secured by it to one party is but of little importance, while it will operate oppressively and to the great annoyance and injury of the other party, unless the wrong complained of is so wanton and unprovoked in its character as properly to deprive the wrong-doer of the benefits of any consideration as to its injurious consequence.

So again in *Attorney-General v. City of Paterson*, 1 Stockton 633, on an appeal from the Chancellor, one of the learned Judges said, that the only question he had to decide upon the motion for a preliminary injunction was, whether a case of irreparable mischief was made out. "When it does not appear that irreparable mischief is liable to ensue from leaving a party to go on exercising a right he claims, the Court never stops him before it has an opportunity of examining the question of right. To do so would be unnecessarily to prejudge the case before a full hearing on its merits," citing 2 *Story's Equity Jur.* sec. 924; *Earl of Ripon v. Hobart*, 3 M. & K. 169; *Kane v. Vanderburgh*, 1 John. Ch. 12; *Jerome v. Ross*, 7 John. Ch. 315, 336, and a number of American cases.

In *Jerome v. Ross*, 7 Johns. Ch. 315, the injunction was refused, because it did not sufficiently appear that the defendant was acting without right, or that the injury would be irremediable; and in refusing the motion the

Chancellor uses this language, at p 332: "The objection to the injunction in cases of private trespass, except under very special circumstances, is that it would be productive of public inconvenience by drawing cases of ordinary trespass within the cognizance of equity, and by calling forth on all occasions its power to punish by attachment, fine and imprisonment for a further commission of trespass, instead of the more gentle common law remedy by action and the assessment of damages by a jury. In ordinary cases this latter remedy has been found amply sufficient for the protection of property, and I do not think it advisable upon any principle of justice or policy to introduce the Chancery remedy as its substitute, except in strong and aggravated instances of trespass which go to the destruction of the inheritance, or where the mischief is remediless."

"I do not know a case," he proceeds, "in which an injunction has been granted to restrain a trespasser merely because he was a trespasser, without showing that the property was of peculiar value, and could not well admit of due recompense, and would be destroyed by repeated acts of trespass. In ordinary cases the damages to be assessed by a jury will be adequate for a check, and for a recompense. Every man is undoubtedly entitled to be protected in the possession and enjoyment of his property, though it may be of no intrinsic value. He may have on his land a large mound of useless stone or sand, which he may not deem worth the expense of enclosing, and yet, it would be trespass for any person to remove any portion of it without his consent; and he would be entitled to an action even though the damages were nominal: but would it be proper for the Court to assume cognizance of such a trespass, and lay the interdict of an injunction upon it?"

A number of other cases are referred to in this judgment, the principle to be gathered from them being, that in respect to acts of trespass committed upon land, even by persons in a public trust under colour of laws, the Court has not interfered by injunction unless when the trespass was

permanent as well as grievous, or went to destroy the value of the property to the owner.

It is not sufficient that the act be simply *per se* a trespass, but it must be a case of mischief and of irreparable ruin to the property in the character in which it had been enjoyed.

Thus, in *Marshall v. Peters*, 12 Howard N. Y. 218, it was held that an injunction should not go to prevent the wrongful cutting and exportation of ice from the complainant's pond, because such injury does not permanently affect the inheritance, ice being a crop which each winter may renew.

I refer to these cases, not as authorities affecting the ultimate decision of this case, but as showing the general principles governing Courts of Equity in the granting of injunctions in the case of trespasses. And I assume for the purpose of the discussion of the present motion, that if the plaintiff should establish his right at the hearing, this Court will protect him in the enjoyment of it by a perpetual injunction. But the question is, what ought to have been done on the present application? And that, it appears to me, is simply a question of comparative injury which may arise from granting or withholding the injunction.

The defendants claim a statutory right to the use of the creeks in question under an assertion that they are streams capable of floating down logs and timber, during freshets, and so within ch. 115 of the R. S. O. Two important questions may therefore arise at the hearing: first, whether the construction placed upon this statute in *Boale v. Dickson*, 13 C. P. 337, and followed by subsequent decisions, be the correct one; secondly, whether the streams were in fact originally capable at particular seasons of the year of floating logs down.

The direct assertions of several of the witnesses in their affidavits upon this point, were considerably weakened upon cross-examination, and some of them were shewn to have no personal knowledge on the subject; and Mr. *Skead*, who was not cross-examined, does not seem to have been on the spot

during a time of freshet, so that his evidence, as well as that of many of the witnesses, was chiefly matter of opinion, which may possibly not be verified by the actual fact. This was however a matter proper to be determined at the hearing, and which ought not in my opinion to be prejudged by any action taken upon this interlocutory application.

I have referred to a number of American cases, decided in accordance with the principles pervading the English decisions as I understand them; but I am enabled to refer to a case decided only last year by the Lords Justices in England on a motion very similar to the present. In a case where the Master of the Rolls had granted an interlocutory injunction, *Elwes v. Payne*, L. R. 12 Ch. D. 68, the language of James, L. J., in reversing the order, seems so apposite that I cannot do better than extract it: "I do not intend to express any opinion that the plaintiffs will not succeed at the hearing of the action in establishing their franchise, which does not seem to be seriously in dispute, and in establishing that what the defendants propose to do will be a nuisance to that franchise; but this is the first time that I have ever heard of an interlocutory injunction being granted in respect of such a right as this. The only question that it seems to me right to decide at the present moment is, whether there has been such a case made out as to induce the Court, before the rights are finally determined, to do something which shall interfere with the *prima facie* rights of the defendants." And again, "The question to be determined at the hearing is, whether what the defendants are doing amounts in point of law to an invasion. In the meantime, as we are not in a position to determine the matter, what is the best thing to be done, with a view to keeping things in such a state as to do the least injury to the person who turns out eventually to be right? The order of the Master of the Rolls is not in accordance with my view of what ought to be done, having regard to the greater or less amount of damages to be sustained by these parties. If the defendants are estopped from beginning a trade, which may be a very valuable trade; then supposing they should turn out to be

right, they will have been prevented from carrying on a trade which they had a perfect right to carry on, and there would be great difficulty in determining the amount of damage they would have sustained. I do not know how they would be compensated, if it should turn out that they are right. On the other hand, if the plaintiffs succeed at the trial, it does not appear to me that there will be the slightest difficulty in giving them full compensation for everything that they can show they have lost."

It becomes therefore, as I have said, a question of comparative injury; and the plaintiff has failed to satisfy my mind that the balance of such comparative injury preponderates in his favour.

On the one side, the defendants may suffer a loss for which any damages awarded by the Court may prove a very insufficient compensation; the logs will necessarily deteriorate in value, and a serious loss be inflicted, not only on the defendants, but upon third parties, at their mill, who may in consequence be thrown out of employment.

On the other hand, it is not shewn that any actual injury will be sustained by the plaintiff; and if any damage should be sustained to the works, the Court at the hearing can grant an enquiry in order to ascertain the measure of damages that have been actually sustained.

It may be unreasonable that these defendants should be allowed to use the improvements of the plaintiff, and pay merely slidage fees, in the event of the plaintiff's exclusive right being established; but this is a matter which can also be dealt with by the Court. If the defendants shall be found to have used the plaintiff's property without any right they will be in the position of trespassers, and whilst not left exposed to any extortionate demand which the plaintiff might think proper to make, would be liable to make a reasonable compensation for the use of improvements which have cost the plaintiff, or those through whom he claims, a large sum of money.

The granting of the injunction must, beyond question, inflict serious loss upon the defendants; it is not shewn

positively that any loss will be sustained by the plaintiff and no loss is suggested for which he could not obtain adequate compensation in damages, and it is admitted that the defendants are perfectly solvent.

Unfortunately we have not before us the reasons given by the learned Vice-Chancellor for the decision at which he arrived. We have to form our judgment without the assistance of these reasons, or the facts on which his discretion was exercised, and to say whether that discretion has been exercised in accordance with the rules which have been established by a long course of decisions which are now settled to be the proper guide to Judges in Courts of Equity. The evidence does establish, I think, that the plaintiff is the owner of the soil through which a portion of these streams flow, but there yet remains a question for trial upon which the defendants may be able to furnish much clearer evidence than they have yet been able to do in answer to this application, and a question therefore which ought not to be prejudged by any order which may be made on this application; and as I have been unable to find any case which militates against the view I have expressed, that upon applications of this nature the Court will have regard to the balance of mischief likely to result from interfering or refusing to interfere, I have come to the conclusion, though with much diffidence, that in exercising our discretion according to settled principles and according to the rules and practice of the Court of Chancery, we ought not to continue this injunction.

I think, therefore, that the appeal should be allowed, and the order for the injunction discharged. Costs of the appeal, and of the motion below, to be costs in the cause.

PATTERSON, J.—I do not intend to add anything to what has been said by my brother Burton respecting the principle on which the Court acts in granting or refusing an interlocutory injunction. It cannot be better illustrated than by reference to the most recent of the English cases which he has cited, viz., *Elwes v. Payne*, L. R. 12 Ch. D.

468. In that case the Master of the Rolls granted the injunction upon the view which he took of the balance of convenience or inconvenience; and the Court of Appeal, adopting the same criterion, discharged his order, as the balance, in the opinion of that Court, inclined the other way.

Even if the evidence produced by the plaintiff upon this application appeared to shew an indisputable title to the right which he charges the defendants with intending to violate, he cannot insist, before submitting his claims to examination and adjudication at the hearing of the cause, that the Court shall interpose on his behalf, unless he shows that there will be irremediable damage or injury caused to him by not granting the injunction, or at least that upon considerations of the balance of convenience or inconvenience it is proper to grant it. In my judgment the plaintiff has fallen far short of establishing either of these positions. If the danger had been that, by permitting the logs now in question to reach the defendant's mill at Carleton Place, a competition in the market would be created which might diminish the plaintiff's profits, the case would somewhat resemble but would not be so strong as that in *Elwes v. Payne*, but no injury of that particular kind seems to be apprehended. The plaintiff in his bill asserts a right to the exclusive user of the streams, and that is the right for which he seems chiefly to seek protection. It has been suggested in argument that it may be of much consequence to him to control the facilities for getting out timber from the immediate district from which these streams form the highway; but his interest in this particular will not suffer, assuming that he succeeds in establishing the right he claims, beyond the extent of this one comparatively small drive of logs.

The damage pointed at in terms by the bill and the evidence is the injury to the plaintiff's works by the transmission over them of these logs, and the loss of compensation which the plaintiff should get for the use of the expensive improvements he has made or acquired. The

bill charges also obstruction of the plaintiff's logs in their passage down one of the streams, but the plaintiff's evidence disproves it. These are all matters which seem to me to be easily capable of estimate and compensation.

On the other side it is made clear that a season's delay in getting down the defendants' logs would be injurious to the logs. I suppose this kind of injury can also be valued and paid for ; and so no irreparable mischief is likely to happen from wear and tear of the works on the one hand, or exposure of the logs on the other. But when we attempt to weigh the possible effect upon the plaintiff's prospects or calculations of a rival lumberman having an outlet for his logs by way of the Mississippi against the possible derangement of business, injury to credit, or inability to fulfil contracts which the want of these logs may bring upon the defendants, we find ourselves in the region of conjecture and speculation. We cannot, it is true, find in the evidence before us any facts which indicate that a basis can be easily found for the computation of the damage which either party may suffer ; but it is at the same time true that the anticipation of damage is itself conjecture, so far as we have to depend on the evidence, and if damage is to be deemed probable the plaintiff has not afforded us the means of saying that his risk is greater than that of the defendants or that the balance of convenience and inconvenience preponderates in his favour. If I were to hazard a guess in the matter it would not be on the plaintiff's side.

But I am not satisfied that the plaintiff has shewn a clear *primâ facie* right to the exclusive control of the streams or of the works upon them.

I express no opinion adverse to the plaintiff concerning the rights he claims. I wish merely to point out that instead of being disposed to treat it as at present made out, the facts stated on the part of the plaintiff seem to me very proper to undergo the more full consideration which they will receive at the hearing, before they are acted on by the Court.

The bill refers to three streams, viz., Buckshot Creek, Louse Creek, and the main branch of the Mississippi. We are not concerned with the last, as no injunction has been issued as to it.

The plaintiff's story about Buckshot Creek, as told in his bill and by his agent, David McLaren, is, that he owns the land through which the creek runs in three places, at each of which he has built a dam. One of these is where the Creek leaves Buckshot Lake on Lot 1 in the 3rd concession of Abinger. The dam is a retaining dam to pen back the waters of the lake. It is not essential to the floating of logs, because Dawson's dam, which is lower down, is capable of doing all that is needful in that locality; and it is not in question here, because the defendants' logs had passed it before the bill was filed.

The other two dams are on lots 44 and 45 in the 12th and 13th concessions of Clarendon. These dams were built eleven years ago. They had got out of repair, and were repaired in the fall of 1879 by the defendants. I do not observe any statement of the exact time in the fall. David McLaren says he was there when they were made eleven years ago, and saw them last September before the defendants' men repaired them. That seems the nearest approach we have to the dates. But the lots were unpatented until the 18th of September, 1879, at which date patents issued for them to the plaintiff. Clearly they were in the crown when the dams were built, and may have been so, for all that appears, when the defendants repaired them, though that is not a matter of much consequence. Then the plaintiff alleges in the 16th paragraph of his bill, and David McLaren echoes it in his affidavit, that he has made improvements of the same nature as these three dams over the whole length of Buckshot Creek, nearly fifteen miles, and in addition to such improvements and the erection of the dams, slides, and piers particularly described, has erected four other dams across the creek at other parts thereof. It does not appear on whose property these are, but David's statement on his

cross-examination that they are not on plaintiff's property is doubtless correct. David thinks that the plaintiff owns the land on which one of these was built, viz., lot 37 or 38 in the 6th concession of Clarendon, and he says he shewed the patent to the plaintiff's solicitor; but it contained some limitation of the plaintiff's absolute dominion, which led to its not being put forward as part of his title.

The statute R. S. O. ch. 115, sec. 1, repeats the law embodied in C. S. U. C. ch. 48, sec. 15, that all persons may, during the spring, summer, and autumn freshets, float saw logs and other timber, rafts, and crafts down all streams.

This has been construed by decisions, the soundness of which I see no reason to doubt, but which we should not question upon an interlocutory application like this, to give the right to float logs, &c., down during freshets, but not to alter, improve, or deepen the natural channel. A good deal of the evidence before us is directed to the assertion or denial of the capacity of these streams for floating logs during freshets without improvements. We have opinions on both sides, supported sometimes by a degree of acquaintance with the streams when unimproved, as in the cases of Mr. Skead for the plaintiff and Mr. Stalker for the defendant, but, after all, we have only opinions, and I cannot say that one set of opinions is worth more than the other set. The point attempted to be made by the plaintiff is, that the streams were not floatable, and therefore not within the statute. The defendant's position is, that the streams were always floatable without deepening or damming, if the obstructions from fallen timber, &c., were removed; but that, at all events, they find them floatable now, and are willing to pay a reasonable price for the use of the plaintiff's works; and that if the plaintiff seeks to exclude them from the streams, the onus is on him to prove his right to do so. I understand them to urge in effect that the fact, if it is a fact, that the streams were not naturally floatable, deprives the plaintiff as well as the defendants of any aid from the statute, and that no legal right to the use of those parts of the stream-bed

which the plaintiff does not own can be acquired by deepening or clearing or otherwise improving it, or by flooding it by means of dams built on land which he does happen to own—that in fact, although he may be able practically to prevent others from using the streams, he can only bring down his own timber by the permission or sufferance of the other land owners, any one of whom might stop him from crossing his land, and that therefore the right he is mainly asserting in this suit has no legal existence.

A question may thus arise for decision which the cases in which the effect of the statute has been considered have not yet dealt with, and which may lie at the root of the exclusive rights on which the plaintiff founds his claim for the injunction.

Having regard to this consideration, and bearing in mind that the plaintiff, however susceptible of demonstration his alleged rights may turn out to be when a more full investigation is had, shews at present no title further back than September, 1879, to the site of the two dams that were built eleven years ago, and were useless in the fall of that year until repaired by the defendants, and no title whatever to the other parts of the creek which he has improved, save only the dam at the lake, as to which no injunction is needed; and bearing in mind also that there is no reason to doubt that the defendants got out their logs in the honest belief that they would be allowed to take them down the stream on some terms, and that this must have been known to the plaintiff, who chose to exercise his undoubted legal right to refrain from undeceiving them—I think it is plain that, even if the proper course would not be to leave the plaintiff to his legal rights without the aid of a Court of equity, the reasons for refusing to enjoin the defendants at his instance at this stage of the case are not confined to the balance of convenience.

These remarks do not altogether apply to Louse Creek, because the title to the dam there is shewn to be derived from Buck and Stewart, who built it years ago on land

patented in 1870. There seems some uncertainty whether this dam, which is the only improvement specifically described on the stream, is to be used by the defendants. Mr. Caldwell swears that he is informed and believes that the dam is not down the stream from where the defendant's logs enter the creek, and David McLaren, in his affidavit in reply, only says that he saw a quantity of defendants' logs lying in the creek *below* the dam, and was told by a man that lives there that they had been put over the dam on that morning (8th May) by the defendants' servants, adding that there is no other way by which the logs can be floated to the Mississippi except through Louse Creek and through the defendants' improvements therein.

These "improvements" seem to consist of clearing out and deepening the stream; but, as in the case of the Buckshot, the plaintiff shews no title to any part of the stream except where the dam is.

I think the defendants are entitled to have the appeal allowed, and that the costs of the motion below and of this appeal should be costs in the cause.

MORRISON, J. A.—I am of the same opinion, and I entirely agree with what my brothers Burton and Patterson have said. I can find no case in which an injunction was issued under circumstances resembling, or analogous to, the one before us; all the authorities go to shew that in cases of trespass an injunction will not be granted unless the trespass will be attended with permanent results, such as spoliation or destruction of the estate, or some irreparable mischief; or where, from the nature of the injury, it is not susceptible of being adequately compensated by an action for damages. The case of *Lowndes v. Bettle*, 33 L. J. Chy. 451, cited by Mr. Blake, contains the most comprehensive exposition of the law in this respect that I have been able to find. All the cases are there discussed by Kindersley, V.C. The principles enunciated in the judgment of the Court, although not strictly applicable to this case,

however, in my opinion, go far to shew that a preliminary injunction ought not to have been granted here.

I see no ground for saying that the alleged threatened trespass would be attended with any permanent or irreparable injury or mischief to the plaintiff's property, or that the plaintiff could not be compensated in damages for any injury he might sustain. In *The Attorney-General v. Hallett*, 16 M. & W. at p. 581, Alderson, B., in giving judgment, says: "I take the meaning of irreparable injury to be, that which, if not prevented by injunction, cannot be afterwards compensated by any decree which the Court can pronounce in the result of the cause." I may here refer, and with much force, as applicable to this case, to what Rolfe, B., said: "It should be recollected that irreparable injury may, in many instances, be occasioned as easily by granting as refusing an injunction." Keeping in view the effect of floating logs down these streams—an act which the plaintiff contends he has the exclusive right to do—can it be said that irreparable injury or any injury is incurred by the defendants doing that which the plaintiff himself does? I think not. If the defendants had floated their logs down the streams in question against the will of the plaintiff, assuming the defendants are wrong in their contention, they would have committed a mere trespass, for which the plaintiff might recover damages as compensation for any injury to his property, as well as compensation for the use of the plaintiff's slides, &c., which the Court, if the plaintiff succeeded in his contention at the hearing, would be quite competent to estimate, and decree payment and a perpetual injunction against the defendants committing like trespasses in future.

As remarked by my brother Burton, we have not had the advantage of knowing the grounds upon which the learned Vice-Chancellor proceeded.

On the evidence before us I fail to see grounds for any reasonable apprehension of irreparable injury, or any injury entitling the plaintiff to call for the interference of

the Court before the hearing of the cause. On the other hand, I think it is evident from what appears in the case, and from the argument before us, that the defendants got out the logs and placed them in the streams, under a *bonâ fide* belief that they had the statutory right to float them down the streams in question. I may say here, without at all prejudging the case of the plaintiff, that as the case stands, *primâ facie*, the Buckshot and Louse creeks appear to be streams within the purview of the first section of the statute. It is clear they are at present capable of floating logs. This is the main point upon which the rights of the parties hinge, and that is the question to be determined at the hearing. The authorities all point out that a clear case must be made by an applicant to entitle him to an injunction, and if the right claimed is of a doubtful character, the Courts will not interfere before the hearing.

Mr. *Story*, in his *Equity Jurisprudence*, sections 959 a and b, says: "That the granting or refusing of injunctions is a matter resting in the sound discretion of a Court of Equity; and consequently no injunction will be granted whenever it will operate oppressively or inequitably, or contrary to the real justice of the case * * or where it will or may work an immediate mischief or fatal injury." And after stating that Courts of Equity constantly decline to lay down any rule which shall limit their power and discretion as to the particular cases in which injunctions shall be granted or withheld, says: "At the same time it must be admitted that the exercise of it is attended with no small danger, both from its summary nature and its liability to abuse. It ought therefore to be guarded with extreme caution, and applied only in very clear cases, otherwise, instead of becoming an instrument to promote the public as well as private welfare, it may become a means of extensive and perhaps irreparable injustice." The learned author cites the case of *Brown v. Newall* 2 M. & C. 570, where I find the Lord Chancellor (Cottenham) saying: "It is absolutely necessary that the power should exist, because there are cases in which it is indispensable, but I

believe that practically it does as much injustice as it promotes justice, and it is therefore to be exercised with extreme caution."

I by no means think, on the evidence, that this is a clear case for a preliminary injunction. I cannot see that the floating of these logs would necessarily cause any immediate injury to the plaintiff's property greater than the floating of his own logs; the only question would be one of remuneration, which could be settled when the Court decided upon the rights of the parties; while to these defendants the detention of their logs over the season for floating them to their mill, obviously might be most ruinous to their credit and business.

If at the hearing the defendants succeed in establishing their right to use these streams for floating their logs, as said by Lord Eldon in one case, the Court would have reason to reproach itself for having restrained the right in the mean time.

ARMOUR, J., dissented.

Appeal allowed.

THE GEORGIAN BAY TRANSPORTATION COMPANY V. FISHER.

Action against vessel owner—Limitation of liability—Injunction restraining proceedings at law.

The defendant, as administratrix of her husband, who lost his life by the foundering of a steamer called the *Waubuno*, belonging to the plaintiffs, on which he was a passenger, sued the plaintiffs to recover damages under R. S. O. ch. 128.

The plaintiffs, who claimed limited liability under sec 54 of 25 & 26 Vic. ch. 63, (Imp.) filed a bill under the Merchant Shipping Act 1854, 17 & 18 Vic. ch. 104, sec. 514, (Imp.) to restrain the action, and prayed that it might be determined by the Court whether they were liable for loss of life or merchandise, and, if so, for what amount, and the persons entitled thereto.

Held. reversing the decree of SPRAGGE, C., 27 Gr. 346, that the *Waubuno*, not having been registered under 17 and 18 Vic. ch. 104, (Imp.), was not a British ship within the meaning of that Act, by virtue of the Statute of Canada 36 Vic. ch. 128, and therefore not entitled to take advantage of the limitation clause; and that even if she were, the plaintiffs were not entitled to an injunction, as they did not admit their liability for damages to the extent mentioned in the Act, and bring into Court or offer to secure the amount.

Appeal from the decree of Spragge C., reported in 27 Grant, 346.

The defendant was administratrix of her husband, who lost his life by the foundering of a steamer belonging to the plaintiffs, on which he was a passenger, upon the Georgian Bay. She had commenced an action against the plaintiffs to recover damages under R. S. O. ch. 128, which contains the law commonly spoken of as Lord Campbell's Act. They claimed limited liability, under the Merchants' Shipping Amendment Act, 1862, 25 & 26 Vic. ch. 63 (Imp.), sec. 54, which Act is to be construed with and as part of the Merchant Shipping Act, 1854 (17 & 18 Vic. ch. 104), and filed their bill, asking the Court, under the provisions of sec. 514 of the last named statute, to restrain the defendant's action. They also prayed that it might be determined by the Court whether they were liable for damage in respect of loss of life, merchandize, or other things, occasioned by the wreck of the vessel, and, if liable,

then for what amount they were liable. And further, that in the event of it being determined by the Court that the plaintiffs were liable for such loss or damage, then that it might be ascertained under the direction of the Court who were entitled to the amount of such damages which the plaintiffs might be found liable to pay, and in what proportions; and that the same might be ratably distributed amongst such persons so found entitled; and they added the formal prayer for taking accounts, and further relief.

The allegations in the bill were, that the plaintiffs were a body corporate, incorporated under the provisions of the Ontario Joint Stock Companies General Clauses Act, for the purpose of carrying on a general freight and passenger traffic, and carrying mails between the port of Collingwood on the Georgian Bay, and the port of Sault Ste. Marie, in the district of Algoma, and all intermediate ports: that the plaintiffs owned a steam-vessel of British build, named the *Waubuno*, which had a gross tonnage of $146\frac{822}{3500}$, and a registered tonnage of $107\frac{822}{3500}$ tons: that the vessel left Collingwood destined for Parry Sound with a cargo, and having on board a number of persons, being captain, crew, and passengers: that she had not since been heard of, and it was supposed she became a total wreck, and that all the persons on board lost their lives thereby: that the defendant, claiming to be administratrix of B. N. Fisher, had brought an action in the Queen's Bench, claiming as such administratrix on her own behalf and on behalf of her infant child \$20,000 damages, in respect of the alleged loss of the life of B. N. Fisher, who was in defendant's declaration alleged to have been a passenger on board the vessel at the time of her disappearance: that the plaintiff threatened to proceed to trial and would do so unless restrained: that the vessel when she left Collingwood, the weather then being favourable, was tight, staunch, and seaworthy, and was well and properly found and manned, and carefully and properly laden. And the plaintiffs submitted that they were not responsible, and were not in

any way blamable for the loss of life and property occasioned by the loss of the vessel, or liable for damage consequent thereupon: that if the loss of the vessel was occasioned by any fault on the part of her captain or crew, which the plaintiffs did not admit, but denied, then the plaintiffs said that the loss of life and damage or loss of goods occurred without the actual fault or privity of the plaintiffs: that the plaintiffs were threatened with numerous other actions for the recovery of damages for loss of life and property caused by the wreck of the vessel, and the plaintiffs believed and charged the fact to be that numerous other persons intended to commence proceedings and were awaiting the result of the defendant's action before bringing action on their own behalf. The plaintiffs claimed the statutory limitation of liability to £15 sterling, per ton, which they computed at £2,205, or \$8,820, as the greatest amount recoverable against them. They submitted that the question of their liability for the damage should be first determined by the Court, and if the Court found them liable, that then the Court should, pursuant to the provisions of sec. 514 of the Merchant Shipping Act, 1854, direct the distribution of the amount for which they were liable, ratably among the several claimants thereto, when such claimants were ascertained, under the directions of the Court; and that the defendant should be restrained from further proceeding with her action against the plaintiffs.

The bill was filed on 3rd March, 1880. The plaintiffs promptly applied for an injunction to restrain proceedings in the Common Law action until the hearing.

The evidence produced in support of the motion consisted of affidavits verifying the allegations of fact contained in the bill, and particularly stating that the *Waubuno* was, on the day she sailed on her fatal trip, a sound and seaworthy vessel, and well and properly manned: that she was in every respect fit to be entrusted with passengers and cargo on the Georgian Bay: that the loss of the vessel was occasioned without any fault or privity of the direc-

tors of the company : that she had been inspected in the Spring of 1879 by one of the Steamboat Inspectors of the Government of Canada, and received from him a certificate of seaworthiness in regular form : that the captain was an experienced and reliable seaman ; and that her chief engineer was a first-class engineer, and had been engineer in that vessel for six or seven years.

The only affidavit used in opposition was that of the solicitor of the defendant, who was also her attorney in the common law suit, exhibiting the pleadings, &c., in that suit, and stating his belief that evidence would be given in support of all the counts in the declaration, and that, after consultation with counsel, he believed that the now defendant had a good cause of action in respect of some or all of the said counts.

The Chancellor, after hearing counsel for the defendant, granted the injunction, and the defendant appealed from that decision.

The case was argued on the 22nd May, 1880. (a)

Bethune, Q. C., for the appellant. The Merchants' Shipping Act of 1854 and the amendments thereto are not in force in this Province, and do not apply to vessels navigating the Georgian Bay. But even if the Act and amendments are in force they do not apply to the case of the *Waubuno*, as in the action at law, restrained by the order appealed from herein, the appellant charges and expects to establish that the vessel was unseaworthy before and on the occasion on which she was lost, and that the loss of the vessel occurred in consequence of the actual fault of the plaintiffs, and with their privity. Inasmuch as the Court of Queen's Bench, in which this action at law is brought, possesses equitable jurisdiction, the appellant submits that if it becomes necessary to give effect to the limited liability clauses of the Merchants' Shipping Act such effect may be given by that Court in the action at law. It is,

(a) *Present*.—BURTON, PATTERSON and MORRISON, JJ. A., and ARMOUR, J.

however, a condition precedent to the exercise of the jurisdiction conferred on the Court of Chancery by the Merchants' Shipping Act that the party seeking to obtain the benefit of the limited liability provided thereby, should admit that he had incurred some limited liability, but the respondents in their bill do not admit, but, on the contrary, deny any liability whatever: *Hill v. Audus*, 1 K. & J. 263; *James v. London, S. W. R. W. Co.*, L. R. 7 Ex. 187. Apart from the statutory jurisdiction conferred by the Merchants' Shipping Act the Court of Chancery has no original jurisdiction to entertain a bill such as has been filed in this case, and the appellant submits that she ought not to be debarred from prosecuting her action at law in the forum chosen by her, and from having the issues raised in such action at law disposed of by a jury. The power given to the Court of Chancery under section 514 of the Act, is simply to determine the amount of a ship-owner's liability, and to distribute that amount among the several claimants, and not to decide the question of liability or non-liability: *Boyd's Merchant Shipping Laws*, 433; *Hill v. Audus, supra*.

McCarthy, Q.C., and *A. R. Creelman*, for the respondents. It was established by the respondents on the application to the Court below for the order appealed against, that the steamer *Waubuno*, at the time of her loss, was a "British" ship, (see sec. 18, sub-sec. 3, 17 & 18 Vic. ch. 104, Imp.) and was registered pursuant to the provisions of that Act; and that the loss of the steamer was occasioned without the actual fault or privity of the respondents. Such being the case the respondents claim that they are entitled to the benefit of the provisions of the Imperial Act 25 & 26 Vic. ch. 63, sec. 54, and that their liability for damages in respect of any loss of life or personal injury caused to any person being carried in such steamer at the time of her loss is therefore limited to an aggregate amount not exceeding £15 for each ton of the said steamer's gross tonnage. The Act 25 & 26 Vic. ch. 63, is one of the Acts amending "The Merchants' Shipping Act, 1854," and in express terms it is enacted by the Imperial Act, 32 Vic.

ch. 11, sec. 7, that in the "Merchants' Shipping Act, 1854," and in the Acts amending the same, "Canada shall be deemed to be one of the British possessions." It was shewn by the respondents that the appellant and various other persons were alleging that the respondents had incurred a liability in respect of loss of life and loss of, or damage to goods, by reason of the loss of the steamer: that the appellant had brought an action at law, and other claims were apprehended in respect of such liability; and therefore the respondents had a right under sec. 514 of "The Merchants' Shipping Act, 1854," to apply to the Court of Chancery of Ontario, which is a Court of competent jurisdiction in a "British possession" to have the action at law stayed, and to compel a ratable distribution of the amount of such liability when determined, amongst the various claimants thereto. The fact that the respondents might have obtained the required relief in the Court of Queen's Bench, affords no ground for denying the respondents the right to proceed in the Court of Chancery if, as it is submitted is the case, that Court is more competent to deal with the questions raised by the bill than a Common Law Court: *Victoria Mutual Fire Insurance Co. v. Bethune*, 1 App. R. 398; *St. Michael's College v. Merrick*, 1. App. R. 520; *Hill v. Audus*, 1 K. & J. 263. It would be inequitable and an injustice to other claimants to allow the appellant to recover in a Common Law Court a larger proportion of the amount which the respondents are liable to pay, should it be ultimately declared that they are liable to pay any amount, than she would be entitled to under a ratable distribution pursuant to the provisions of the limited liability clause of the "Merchants' Shipping Act. The Court of Chancery has as full jurisdiction in the matters raised by the bill of complaint as the Courts of Common Law, and if the Courts of Common Law have original jurisdiction to try the question whether the plaintiffs are liable at all, in the premises, which proposition the appellant concedes, then the Court of Chancery has also original jurisdiction to try such questions of

liability : R. S. O. ch. 49, sec. 21 ; see also sec. 2. The Court of Chancery having original jurisdiction to try the question of liability, it is not a condition precedent to the right of the respondents to apply to that Court for relief under the limited liability clause, that the respondents should admit their liability : *The Amalia*, 1 Moore, P. C. Cases N. S. 471 ; *The Normandy*, L. R. 3 Ad. & Ec. 152, 157.

September 7th, 1880. PATTERSON, J.A.—The judgment delivered by the Chancellor is occupied with two questions : viz., the applicability of the Merchant Shipping Act to the case of this vessel, and the jurisdiction of the Court of Chancery under sec. 514 of the Act.

The discussion before us has taken a wider range, and it will be necessary to consider some topics which I imagine were scarcely touched upon before the Chancellor, although they arise properly upon the materials which were before him, and may turn out to be quite as important to the merits of the question as those to which his attention was more particularly directed.

The subject is a novel one in our Courts, and the consideration of it may therefore be facilitated by a preliminary glance at the history and present position of our statute law.

The registration of British vessels was regulated during the twenty years next before the passing of the Merchant Shipping Act, 1854, by the statute 3 & 4 Wm. IV. ch. 55. That statute did not extend to vessels navigating our inland waters, and not proceeding to the sea ; and accordingly, the Legislature of Canada, in 1845, passed the Act 8 Vic. ch. 5, which embodied provisions similar to those of the Imperial Act, and contained a provision that the Provincial Act should cease and determine as to any further registration under it, if at any time the Imperial Act should be extended to vessels navigating the inland waters of the Province and not proceeding to sea. This event never happened. The Imperial Act was repealed by the Merchant Shipping Act, 1854, (17 & 18 Vic. ch. 104). In

consolidating the Statutes of Canada in 1859, the Act of 8 Vic. ch. 5, was treated as still in force; but the clause respecting the cesser of the Act was modified by substituting for the reference to the Act of 3 & 4 Wm. IV., which had then ceased to exist, the enactment that our Act should cease and determine as to any further registration under it whenever the *laws of the United Kingdom* for the registering of British ships were extended to vessels navigating the inland waters of the Province, and not proceeding to sea. A year or two later it was decided by our Court of Queen's Bench (*Scott v. Carveth*, 20 U. C. R. 430), that notwithstanding the extension to the colonies of the general provisions of the Merchant Shipping Act, 1854, the Provincial Act remained in force, and applied to vessels not proceeding to sea, while vessels proceeding to sea were governed by the Imperial Act.

The Merchant Shipping Act, 1854, sec. 547, empowered the legislative authority of any British possession, by any Act or ordinance confirmed by Her Majesty in Council, to repeal wholly or in part any provisions of the Act relating to ships registered in such possessions; a power which, being contained in the Act itself, is clearly sufficient to preserve the right of Colonial legislation on the subjects dealt with by that statute, notwithstanding the later Act, 28 & 29 Vic. ch. 63, which avoids any law of a colony repugnant to an Imperial Act.

In the exercise of the power thus given, the Parliament of Canada passed the Acts 36 Vic. chs. 128 and 129, which were confirmed by Her Majesty in Council, and which repealed several provisions of the Merchant Shipping Act, 1854, and enacted others upon the same subjects. Ch. 128 deals with the registration of shipping. It repeals so much of the Merchant Shipping Act, 1854, and of any other Act amending it and forming part of it, as is inconsistent with ch. 128, so far as relates to ships registered in Canada. It also repeals chs. 41 and 42 of the Consol. Stat. Canada, the former of which represented 8 Vic. ch. 5. It makes some provisions concerning the registration of ships,

of which it will be sufficient to note the following: By sec. 14 no ship duly registered under Consol. Stat. Canada, ch. 41, before 17th March, 1874, on which day ch. 128 took effect, was required to be registered under ch. 128, except for the purpose of enabling her to proceed to sea as a British ship. Sec. 8 had declared that, except as thereafter mentioned, no ship propelled either wholly or in part by steam, whatever her tonnage, and no ship not propelled either wholly or in part by steam, of more than ten tons burthen, and having a whole or fixed deck, although otherwise entitled by law to be deemed a British ship, should be recognized in Canada as a British ship, nor be admitted to the privileges of a British ship in Canada, until nor unless she be duly registered in the United Kingdom or in Canada, or some other British possession, under the Merchant Shipping Act, 1854, and amending Acts; and sec. 14 proceeded to enact that no ship required by Consol. Stat. Canada, ch. 41, to be registered shall, unless duly registered under the provisions of the said Act before the said day (*i.e.*, before 17th March, 1874), and no other ship required to be registered under the provisions of the Merchant Shipping Act, 1854, amended as aforesaid, or under the provisions of this Act, shall, unless so registered before or after the said day, be recognized in Canada as a British ship.

Having regard to the terms of these Canadian statutes, as well as to those of the Merchant Shipping Act, 1854, it is clear that the latter must be recognized as in force here, and as applying to ships navigating only on inland waters as well as to those proceeding to sea, except so far as it is modified by the provisions of the Canadian Acts.

Turning to the Act of 1854, we find, in sec. 18, the declaration that "no ship shall be deemed to be a British ship unless she belongs wholly to owners of the following description: that is to say, * * (3) Bodies corporate, established under, subject to the laws of, and having their principal place of business in the United Kingdom or some British possession." Section 19 enacts "that every British ship must be registered in manner hereinafter mentioned,

except [then describing three classes, which do not include the *Waubuno*], and no ship hereby required to be registered shall, unless registered, be recognized as a British ship." And by sec. 106, "whenever it is declared by this Act that a ship belonging to any person or body corporate, qualified according to this Act to be the owners of British ships, shall not be recognized as a British ship, such ship shall not be entitled to any benefits, privileges, advantages, or protection usually enjoyed by British ships, and shall not be entitled to use the British flag, or assume the British national character; but so far as regards the payment of dues, the liability to pains and penalties, and the punishment of offences committed on board such ship or by any persons belonging to her, such ship shall be dealt with in the same manner in all respects as if she were a recognized British ship."

Then we come to the clauses on which the questions before us more immediately arise.

The section of the Act of 1854 which limited the liability of ship owners was 504, the place of which is now occupied by sec. 54 of the Merchant Shipping Amendment Act, 1862, 25 & 26 Vic. ch. 63. Under sec. 54, "the owners of any ship, whether British or foreign, shall not, in cases where all or any of the following events occur without their actual fault or privity,—that is to say, (1) where any loss of life or personal injury is caused to any person, being carried in such ship; (2) where any damage or loss is caused to any goods, merchandize, or other things whatsoever on board any such ship; (3) where any loss of life or personal injury is, by reason of the improper navigation of such ship as aforesaid, caused to any person carried in any other ship or boat; (4) where any loss or damage is, by reason of the improper navigation of such ship as aforesaid, caused to any other ship or boat, or to any goods, merchandize, or other thing whatsoever on board any other ship or boat—be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandize, or other

things, to an aggregate amount exceeding fifteen pounds for each ton of their ship's tonnage : nor in respect of loss or damage to ships, goods, merchandize, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage ; such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steam ships the gross tonnage, without deduction on account of engine room." Sec. 514 provides that, " In cases where any liability has been or is alleged to have been incurred by any owner in respect of loss of life, personal injury, or loss or damage to ships, boats, or goods, and several claims are made or apprehended in respect of such liability, then * * it shall be lawful in England or Ireland for the High Court of Chancery, and in Scotland for the Court of Session, and in any British possession for any competent Court to entertain proceedings at the suit of an owner for the purpose of determining the amount of such liability * * and for the distribution of such amount ratably amongst the several claimants, with power for any such Court to stop all actions and suits pending in any other Court in relation to the same subject matter ; and any proceeding entertained by such Court of Chancery or Court of Session, or other competent Court, may be conducted in such manner and subject to such regulations as to making any person interested parties to the same, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of costs, as the Court think just." And sec. 516 carries into this enactment the principle on which sec. 106, which I have quoted, is founded, by declaring that nothing in the ninth part of the Act shall be construed to extend to any British ship not being a recognized British ship within the meaning of the Act.

It may be necessary to inquire further on, whether the *Waubuno* is shewn to have been entitled to be recognized as a British ship ; because I take the effect of sections 106

and 516 to be that if she was not so entitled, her owners could not claim to come within section 54 of the Act of 1862, or section 514 of the Act of 1854, by any such argument as that a vessel must be either British or foreign, and that section 54 applied to both classes indifferently. For the present, I pass by that question, and, assuming her to have been properly recognizable as a British ship, I proceed to notice some of the decisions under the Act of 1854.

Hill v. Audus, 1 K. & J. 263, was decided by Wood, V. C., in 1863. The bill was filed by the owner of the *Clara*, against three parties, alleging that two of them had commenced action in the Court of Admiralty for losses occasioned by the ship *Eliza* having been run down by the *Clara*, and that claims by the third were apprehended; that the plaintiff did not admit liability to any of these parties; and that the claims if established would exceed the value of the *Clara*; and praying that if necessary the question of the plaintiff's liability as owner of the *Clara*, on account of the collision, might be determined, and for the application of the provisions of sec. 514 in his favour.

The Vice Chancellor held that the owner was entitled under the section to say, "my liability being limited, I wish to bring the fund into Court, and to be protected against a multitude of actions;" but that he must admit some liability on bringing the matter into the Court of Chancery, and that the only question to be tried by the Court was the amount of damage which each claimant had suffered. After quoting the words of the clause, he said, at p. 267: "therefore this Court is to ascertain the amount of liability according to section 504, [which made the whole value of the ship the fund for distribution, and fixed £15 per ton as the minimum value] and, having done so, is to apportion that sum ratably amongst the several claimants; and if a bill may be filed in which no liability is admitted, all these proceedings might be taken, the fund brought into Court, or security giving pending the inquiry; and after all it might be found that there was not anything to secure or divide, and

that the whole proceeding had been about nothing." I do not quote these words as containing an argument which strikes me as very conclusive. I refer to them chiefly for the intimation they contain, which is found also in other parts of the judgment, that the plaintiff, who asks the protection of the Court, under the section 514, must secure, or, pay into Court, the fund of which he asks the Court to undertake the distribution.

In 1857, the same eminent Judge had occasion to decide a point of a different character, in *Leycester v. Logan*, 3 K. & J. 446. The plaintiffs in that case admitted their liability to the extent of the value of their vessel and freight, and that it was insufficient to meet all claims that might be made in respect of a collision. One claimant had taken proceedings in the Court of Admiralty, and had obtained a judgment of that Court, condemning the ship for the purpose of answering his debt and costs. The point decided was, that that judgment *in rem* did not prevent the Court of Chancery injoining proceedings in the Court of Admiralty, subject to the plaintiff in that Court proceeding to sell the ship and retain his costs out of the proceeds; as under former statutes the recovery of a judgment at law did not interfere with the right to have the limitation of liability enforced, which was shewn by the case of *Dobree v. Schröder*, 2 My. & Cr. 489. The Vice Chancellor in his judgment refers, as he had done in *Hill v. Audus*, to the object of sec. 514 being to secure to ship owners the limitation of liability, and to obtain for them the full benefit of having the whole case settled at once, on their placing themselves in a position to pay or to secure as the Court may direct, the value of the ship.

The first case I notice after the act of 1862, is *The Amalia*, 1 Moo. P. C. N. S. 471. The only point decided in the Privy Council related to the application of sec. 54 to foreign ships; but the report contains the judgment of Dr. Lushington, delivered in the Court of Admiralty, in July 1863. The owners of the *Amalia*, which had sunk a Belgian vessel in the Mediterranean, claimed limited liability; and the claim

was entertained by the Court of Admiralty, under an Act of 1861, (24 Vic. ch. 10) which authorized that Court when the vessel or her proceeds were arrested, to exercise the same jurisdiction in these matters as the Court of Chancery. Referring to *Hill v. Audus*: Dr. Lushington said: "It is not for me to question the soundness of that judgment; the circumstances under which I am called upon to apply the statute, are very different; this Court is at this present moment detaining a very valuable ship at a great loss to her owners, and if the Court can release this vessel from arrest, and at the same time secure the claimants the utmost amount that if successful they could receive under the 54th sec. of the Act of 1862, surely it is the duty of the Court to do so. I have therefore come to the conclusion that it is not indispensably requisite in these cases, that the owner of a ship, be he British or foreign, preferring a claim in this Court under the statute to limited liability, should begin by acknowledging that his vessel is to blame." It should be mentioned that *The Amalia* was under arrest at the suit of the owners of the Belgian vessel, and that the petition for limited liability was in a cross-suit instituted by her owners.

Then I come to a suit in 1865, which seems to have been fruitful in questions viz.: *Glaholm v. Barker*. It arose out of a collision, in which the brig *Edith Murray* had run into and sunk a collier named *The Thomas Parker* laden with coal, whereby some of the crew of the latter perished. The case first appears in 24 Beav. at p. 305, when the Master of the Rolls decided that the limitation was £15, and not £8 per ton, and that the action given by Lord Campbell's Act was not taken away by the Merchant Shipping Act, although the amount of damages might be limited. This decision was affirmed by the Lords Justices, in January 1866: L. R. 1 Ch. App. 223. The plaintiffs in that suit admitted their liability, but contended that it came within the £8 limitation. Later in 1866, the Master of the Rolls, had to decide in the same case (L. R. 2 Eq. 598,) the proper mode of distributing the amount for which the owners were liable. This report is not foreign to the present inquiry, because it affords an

instance in which damages were assessed under Lord Campbell's Act, not by a jury, but by the chief clerk. One question in the case arose from the circumstance that the aggregate damages came to a smaller amount than the value of the vessel at £15 per ton.

The subject of actual fault or privity was before the Court of Admiralty in 1865, and 1866, in two cases, viz.: *The Spirit of the Ocean*, 34 L. J. Adm. 74; and *The Obey*, 1 A. & E. 102 L. R. In each case the master, who was on board when the collision occurred, was said to be part owner of the vessel; and in each case it was held by Dr. Lushington, that the fault of a part owner, although it might destroy his own right to limitation of his liability, would not involve his co-owners in that consequence. In the case of *The Obey*, it was also held, that the fact that the master was below when the accident occurred, and that it might have been prevented if those on deck had kept a proper look out, did not prove that he was in fault; and the learned Judge, while holding that "privity" was not shewn, abstained from expressing an opinion as to the true meaning of the word, as used in the statute.

The decision in *The Spirit of the Ocean* turned upon the question whether the master was in fact a part owner, he having conveyed away his shares by a bill of sale, which had not been registered. He was held not an owner. A remark of Dr. Lushington in this case suggests caution in applying to the case of partners the ruling as to co-owners, that the fault of one will not cause the others to forfeit the privilege of limitation of liability.

Several cases of importance arose by reason of a collision between a steamship called *The Normandy*, belonging to the London and South-Western Railway Co., and another steamship called *The Mary*, in consequence of which *The Normandy* sank, and many of her passengers and crew, and the whole of her cargo were lost, and *The Mary* and part of her cargo suffered damage. Actions were brought in the Court of Admiralty, by the owners of each vessel against the owners of the other. The case of *The Normandy*, re-

ported in L. R. 3 A. & E. 152, was a cause of limitation of liability, instituted on behalf of the railway Co., as owners of *The Normandy*, against the owners of *The Mary*, and against the owners of the cargo of *The Mary*, and against all persons interested in the vessels *Mary* and *Normandy*, or having any right claim or interest with reference to or arising out of the collision. Sir Robert Phillimore, decided that the Court had jurisdiction under the Admiralty Court Act, notwithstanding that *The Normandy* had not been and could not be arrested, and that bail had not been given in lieu of an arrest; and that the suit could be entertained without an admission by the plaintiffs of their liability; and he made an order to stay proceedings in actions in the Common Law Courts "the plaintiffs by their counsel, undertaking to admit their liability in all such actions and suits, as soon as this Court shall have pronounced for the damage proceeded for in the cause pending in this Court, entitled *The Normandy*, (5359) or for a moiety of such damage." This cause, 5359, was the cause of damages, instituted by the owners of *The Mary*, and not the cause of limitation of liability, which was No. 5366. The judgment was pronounced on 14th July, 1870. On the 30th of the same month, judgment was given in the cross actions for damages, holding that *The Normandy* was solely to blame for the collision; and on 4th August, the owners of *The Normandy* admitted their liability in the limitation suit, and paid into Court £6,376, with interest, that being the sum to which their liability was limited at £15 per ton. This was the position when an action for prohibition was brought in the Exchequer; (*James v. London and South-western R. W. Co.*, L. R. 7 Ex. 187), by John James, one of the persons who had brought actions against the owners of *The Normandy*, which resulted in the award of a writ of prohibition to the Court of Admiralty, upon the ground that the statute gave jurisdiction to that Court, under sec. 514 of the Merchant Shipping Act, 1854, only when the ship or her proceeds were under arrest. The prohibition had been insisted upon, also, for the reason that the owners had not admitted their

liability when the cause was instituted. That subject was discussed in the judgments, but the decision did not rest upon it. *Kelly*, C. B., while of opinion that it was an objection to the proceedings that there was no admission of liability before the commencement of the suit, considered it clear that there must be unequivocal admission at some period before decree, so as to enable the Court to pronounce judgment. Referring to *Hill v. Audus*, which had been cited as an authority that the admission must be prior to the suit, he remarked that in that case the bill was dismissed, not because liability was not admitted, but because it was denied, and that the judgment of the Vice Chancellor did not support the plaintiff's contention. Martin, B., spoke of the Court of Chancery having frequently exercised the jurisdiction given it by sec. 514, to entertain proceedings for the determination of the amount of liability and the distribution of that amount, but said that it had, as he understood the decision in *Hill v. Audus*, which was binding on his Court, always insisted that the party who sought to obtain limited responsibility should admit his liability to some extent, as the foundation of the jurisdiction. In the Exchequer Chamber (L. R. 7 Ex. 287) when the judgment of the Exchequer was affirmed, *Hill v. Audus* was referred to by two of the learned Judges, viz. : Willes J., and Blackburn, J., and their remarks may be usefully extracted. Willes, J., said : "With regard to the mode in which the Court of Chancery exercises its jurisdiction, I may note that in *Hill v. Audus*, the bill does not seem to have been actually dismissed, though the Vice Chancellor seems to have been ready to dismiss it, because there was no admission of liability; the decision of the Court, however, simply was that no injunction ought to be granted to restrain the trial of a particular action which had been brought against the plaintiff, and which he sought to restrain. And that is intelligible, because the Court of Chancery would have had no ordinary jurisdiction to try the subject matter of that action. But this is not equivalent to dismissing the bill because it contained no general admission of liability. Serious conse-

quences might ensue, if such a bill were dismissed simply because, in the first instance, there was no admission of liability as to all the persons who might be interested in the matter; seeing that except through the intercession of the Court of Chancery, there is no mode of arriving at the amount to which the liability is to be limited, and no mode of distribution provided." I may remark with reference to the allusion, to an "admission of liability as to the person who might be interested in the matter," that I do not understand that to be the exact nature of the admission in question. I understand it to be an admission of negligence or default on the part of some one for whose conduct the owner is responsible, and for which the owner is answerable in damages, though not personally chargeable with any fault, or with privity in the wrong committed; and not necessarily an admission of the extent, or even of the existence of the legal claim of a particular individual; or, as expressed by Dr. Lushington in *The Amalia*, an admission that his ship was to blame.

Blackburn J., said, "As to the case *Hill v. Audus*, I feel a difficulty in concurring with what the Vice Chancellor is reported to have said in the course of his judgment. But I concur with my brother Willes, that the Vice Chancellor did right. The bill was not, as was supposed, dismissed; but the injunction applied for, which was to restrain an action which could not have been brought in the Court of Chancery, was properly refused."

There are two cases reported in 32 L. T. N. S., viz.: *The Thames*, at p. 344, and *The Sisters*, at p. 837, arising out of a collision in which *The Thames*, which was a steamship, ran into and sank the barges *Volunteer* and *Alfreda*. In the first action the owners of the barges failed to recover against *The Thames*, because it appeared that *The Thames* had been compelled to deviate from the course which would otherwise have been proper to avoid running over *The Sisters*, which had improperly crossed her bows. In the second action, the same parties sought to make *The Sisters* liable for the collision; and on the part of *The Sisters*,

which had been arrested, the application was for leave to give bail for £960, the amount of her tonnage at £15 per ton, with a further sum for interest and costs. The owners did not admit their liability, but intended to defend the cause of damages which had been brought against them. On the language of Kelly C.B., in *James v. London and South-western R. W. Co.*, L. R. 7 Ex. 187, being cited, Sir R. Phillimore observed, that that ruling was only a dictum, and that *The Amalia* had never been overruled, and he must follow it. He accordingly ordered that *The Sisters* be released from arrest on payment into Court by her owners of the amount for tonnage, interest and costs; and he refused leave to appeal on so small a point, when it was clear that the plaintiffs would ultimately be able to obtain limitation of liability. It had been stated on affidavit, that none of the owners of *The Sisters* were on board at the time of the collision, and that it was without their actual fault or privity. The subsequent history of the case will be found in L. R. 1 P. D. pp. 117 & 281.

The Expert, 36 L. T. N. S. 258, may be referred to as an example of the rule, which seems always observed, requiring payment into Court of the amount of liability, though in that case there was no question with which we are at all concerned.

The Rajah, L. R. 3 A. & E. 539, merely decided that the statutory limitation is the maximum liability for damage occasioned by one act of improper navigation, although two ships were injured.

After the final prohibition of *The Normandy Case* in the Court of Admiralty, the London and South-western R. W. Co. filed a bill in Chancery, where, after the discussion of some matters, not of interest in the present case, a decree was made by the Master of the Rolls, from which an appeal was taken to the Court of Appeal in Chancery, and was partly heard by the Lords Justices, and then, on account of the importance of the questions involved, referred to the full Court, and argued before the Lord Chancellor (Lord Selborne) and James and Mellish, L.J.J.: *London and*

S. W. R. W. Co. v. James, L. R. 8 Chy. 241. The questions of difficulty were not those which at present concern us. They chiefly related to the right of a railway company undertaking in one contract to carry partly by railway and partly by water, under the circumstances in that case, to the benefit of limitation of responsibility. For the purposes of that suit, the plaintiffs admitted their liability, but they had to meet the resistance of the plaintiffs in some of the Common Law suits, against the issue of an injunction to restrain their further prosecution. Referring to this, the Lord Chancellor said, p. 251: "Is there, then, any reason of practical convenience which makes it better to direct that actions shall proceed in all these cases of loss of life—any reason which makes that more convenient than to refer the whole matter for inquiry in Chambers, where it will be ascertained in how many of those cases there is a real contest which may require a decision, it may be with the aid of a jury, or it may be without. Upon that subject I say nothing at present. But I understand that the experience acquired in the case of *Glaholm v Barker*, has shewn that similar claims may be all settled in Chambers, without incurring much further expense. It appears to me that the wiser and better course will be to refer the whole matter for inquiry in Chambers, it being entirely in the power of the Court, if it should eventually appear necessary, to determine any question by taking the opinion of a jury." The Lord Chancellor afterwards explained that as to *James* the injunction would extend only to his claim for loss of luggage or goods. He had a further claim for delay, founded on the contract of the railway company as carriers.

It may be worth noting, though perhaps aside from our immediate purpose, that in the case of the *Normandy*, while the liability of the owners was at first disputed, the contest was as to the existence, not to the extent of the responsibility. It was not between limited and unlimited liability. It is expressly stated as a fact not in controversy in the report in L. R. 3 A. & E. 152, that the collision was without the actual fault or privity of the railway company.

The matter for decision was whether *The Normandy* or *The Mary* was solely to blame, or whether both had been in the wrong. One conclusion would have freed *The Normandy* from responsibility ; another would have divided the burden ; and the third, which was that at last reached, threw the whole upon the owners, but only under the statutory limitation.

From these cases it may be gathered, that in England, if an owner resorted to the Court of Chancery to enforce the limitation of his liability, he was required to admit that he was liable to some extent ; the negligence or default which had been the cause of his vessel doing damage, or occasioning loss of life or goods, had to be admitted, although he may have had no personal share in it, but was responsible only for the conduct of others ; but it was not necessary to admit the extent of his liability to every or any particular claimant, or even that he was liable to all of them. Those matters could be determined by the ordinary machinery of the Court, even when the claims arose under Lord Campbell's Act. But in a cause of limitation of liability in the Court of Admiralty, it was not necessary to admit liability — the distinction between the practice of the Courts being sometimes explained on the ground that the Court of Admiralty had jurisdiction to determine the fact of liability, while the Court of Chancery had no such jurisdiction ; but it may not be quite certain that the explanation is entirely satisfactory.

In the Probate, Divorce, and Admiralty Division of the High Court of Justice, I suppose the law will be administered on the same principles as it was in the Court of Admiralty ; in fact the decision of Sir R. Phillimore, to which I have alluded, to follow the authority of Dr. Lushington in *The Amalia*, was announced in the P. D. & Adm. Div.

The practice in Admiralty to entertain suits for limitation of liability without a preliminary admission of liability, does not appear to have received the formal confirmation of an Appellate Court ; but, assuming it to be the practice settled and recognized as appropriate to the

powers and functions of the Court of Admiralty, as I take it to be, the present constitution of the High Court of Justice may perhaps involve the consequence that in the Chancery Division also the preliminary admission of liability should be no longer insisted on. I have not noticed any allusion to this topic in any reported case; and I imagine that the working of the law may not yet be quite settled, as such differences of opinion are yet possible as lately led, in the case of *The Franconia*, L. R. 2 P. D. 170, to an equal division in the Court of Appeal, consisting of four Lords Justices, upon the question of the power of the P., D., and Admiralty Division to proceed *in rem* against a vessel for damages under Lord Campbell's Act.

If I correctly apprehend the practice in the Court of Admiralty, it did not happen there, any more than in Chancery, that the question of liability was litigated in the cause of limitation. I understand it always to have been the subject of a separate action, brought by the claimants, or some one of them, against the owner. The foundation of the jurisdiction given to the Court of Admiralty by 24 Vic. ch. 10, sec. 13, to entertain the same proceedings which the Court of Chancery was empowered by 17 & 18 Vic. ch. 104, sec. 514, to entertain, was the fact that such an action had been brought. It was only where the vessel or her proceeds were under arrest, where the Court was not only seised of the question of liability for the purpose of adjudicating upon it, but had already possession of the fund from which claims were to be paid, that the owner was enabled to apply to that Court to undertake the determination of the amount of his liability under the statutory limitation, and the distribution of that amount ratably among the claimants. The existence of the cause of damages in which the question of liability had been or was to be determined, was thus essential to the exercise by the Court of Admiralty of the powers enjoyed under sec. 514.

The cases, therefore, afford no authority for the proposition that the power of the Court of Chancery in this

Province as a "Court of competent jurisdiction," under sec. 514, "to entertain proceedings, at the suit of any owner, for the purpose of determining the amount of such liability, and for the distribution of such amount ratably amongst the several claimants," carries with it the jurisdiction to try whether a wrong has been committed for which the owner is responsible in damages. If that power exists it must be by reason of the ordinary jurisdiction of the Court. The analogy to the Court of Admiralty, asserted on the footing of the jurisdiction which our Court of Chancery can now, by statute, exercise in dealing with common law rights, is not of itself, and in the absence of anything equivalent to the arrest of the vessel, so close as to indicate that the rule acted on in that Court, rather than the practice of the High Court of Chancery, ought to guide its proceedings under sec. 514; or to lead us to read that section as giving it power to restrain the prosecution of an action pending in a common law Court, in which the liability of the owner is in contest, and to remove that question, at the instance of the owner, for trial before itself.

One cannot venture to speak with confidence of the procedure of a Court, with only so much knowledge of it as is gathered from reading a few reported cases, but it strikes me that in the present matter the course more naturally suggested by analogy to the Admiralty procedure is to leave the Queen's Bench, which has the question of liability already in issue before it,—if the owners are not required to admit their liability—to proceed to the adjudication of that question, and also to deal with that of the limitation of liability, if the owners choose to move that Court for the purpose. It is a Court of competent jurisdiction, within the meaning of sec. 514.

There may be reasons of convenience for using in preference the machinery of the Court of Chancery for the distribution of the ratable shares of the claimants. I do not say that these reasons have much force, or that they exist. If they do exist, however, our present system makes

that machinery accessible, even though the action may be commenced in the Queen's Bench. The right of the owner, under sec. 514, is to resort to any Court of competent jurisdiction. He has clearly the right to select the Court of Chancery. But when he asks for an injunction to restrain the proceedings in another Court, which the claimant had an equal right to select as the tribunal to try the validity of his claim, he must either shew that by the terms of the statutes he is entitled *ex debito* to what he asks, or that considerations of convenience, or the like, make it proper to grant it.

Our Court of Chancery has jurisdiction in all matters cognizable in a Court of law: R. S. O. ch. 40, sec. 86. This jurisdiction is bestowed in terms wide enough to embrace actions under our adaptation of Lord Campbell's Act: R. S. O. ch. 128. I do not doubt, therefore, that the action now pending in the Queen's Bench might have been entertained in the Court of Chancery; and no question can arise in that action, or in any action concerning the loss of the *Waubuno*, which would not be cognizable under the existing jurisdiction of that Court. But I think we should be taking a step in advance of anything warranted by English authority if we held that sec. 514 authorized or required the Court, without any admission of liability by the owner, and without any proceeding in the Court analogous to the arrest of the ship by the Court of Admiralty, and without the pendency of any action in the Court in which the liability of the owner was to be decided, to stay such an action in another Court. I do not perceive any reasons of convenience requiring the intervention of the Court by injunction, inasmuch as the whole matter can be dealt with by the Queen's Bench, or transferred at any stage to the Court of Chancery; and there is no necessity for the injunction in any case until the question of liability has been decided, because the Court can interpose after judgment as well as before, and restrain the defendant, if she recover in the Queen's Bench, from enforcing her damages by execution, and compel her to come in and

share ratably with the other claimants. Authority for this will be found in *Dobree v. Schröder*, 2 My. & Cr. 489, and *Leycester v. Logan*, 3 K. & J. 446. *The Sisters*, L. R. 1 P. D. 281, may also be referred to as shewing that the two causes, for damages and for limitation of liability, though in the same Court, are kept distinct; the former prosecuted to judgment; and then the money distributed in the latter.

In connection with the question of the ultimate distribution of the fund, we must notice one peculiarity of the plaintiffs' bill which, as I have before intimated, differs from any other that I have seen. They neither bring into Court, nor offer to bring in or to secure, any amount whatever. In England, if I have correctly deduced the practice from the cases I have referred to, it is essential that the plaintiff shall bring into Court or secure the amount to which his liability is limited, and this in cases in which he disputes his liability, as well as when he admits it. This appears to me to be the only way to give effect to the provisions of sec. 514, in relief of the owner, without exposing claimants whose common law right to full compensation is, for reasons of policy, cut down by the operation of the statute, to the risk of further injustice. The statute takes from them the control of their own proceedings, and the power to enforce their right by the ordinary process of the Courts, and forces them to be content with their ratable share of the limited amount; but it does not bestow the advantage upon this owner unless on condition of his making them secure of receiving their distributive share.

On this ground, also, I think the plaintiffs are not entitled to the injunction.

Then there is another and more serious obstacle in their way.

I have not been able to see that the *Waubuno* was a recognized British ship, and in that respect within the limitation clauses.

The bill does not allege that she was a British ship, and there is nothing in evidence before us to supply the omis-

sion. We have inquired of counsel how the fact was, supposing that the absence of allegation or proof might have arisen from oversight; and we are given to understand that she was registered under Consol. Stat. Canada, ch. 41, before 17th March, 1874, and was not registered under the Merchant Shipping Act, 1854. Under the terms of the Act of 1854 it is clear she was not a recognized British ship. The question is, whether the position is altered by the effect of the Statute of Canada 36 Vic. ch. 128. I have already quoted the material provisions of that Act. I think the reasonable construction to be given to secs. 8 and 14, read together, would require us to hold that the *Waubuno* was to be recognized in Canada as a British ship, for all purposes touched by that Act, or the one next following it, ch. 129. Those statutes contain many important enactments concerning British ships, but none on the subject of limitation of liability, which occupies the 9th part of the Merchant Shipping Act, 1854. Sec. 516 of the Merchant Shipping Act, enacts that nothing in the ninth part of the Act contained shall be construed to extend to any British ship not being a recognized British ship within the meaning of that Act. This directs our attention to sec. 19, which declares that "every British ship must be registered in manner hereinafter mentioned, except, &c., and no ship hereby required to be registered shall, unless registered, be recognized as a British ship." The Canadian Act is not to be read as a part of the Merchant Shipping Act, 1854. At least nothing contained in it declares that it is to be so read. It repeals so much of the Merchant Shipping Act as is inconsistent with it, so far as relates to ships registered in Canada. Let us see how far the repeal touches this question. Under sec. 14 a vessel, registered as the *Waubuno* had been, was exempted from the necessity of being "registered in pursuance of the provisions of *this* Act, except for the purpose of enabling her to proceed to sea as a British ship." It seems to me, after much consideration and some fluctuation of opinion, that the declaration of sec. 14, dispensing, except for one specified purpose, with

registration in pursuance of the provisions of the Canadian Act, is not so inconsistent with sec. 19 of the Merchant Shipping Act as to repeal that section to the extent of removing this vessel, as long as she did not go to sea, from the category of vessels required to be registered, and that therefore she cannot be treated as a recognized British ship under sec. 516.

I find the limitation clauses treated by Judges of the highest eminence as proper to be construed strictly, because they derogate from common law rights. In *The Andalusian*, L. R. 3 P. D. 182, limitation of liability was claimed for a vessel built for a steamship, which, when being launched on the river Mersey, injured another vessel. She had not been registered, and was, in fact, incapable of being registered when the accident happened, because of her imperfect and unfinished state; but it was intended to register her, and she was afterwards registered. Sir Robert Phillimore held that although she could properly be called a ship, and although she was built by and belonged to British owners, yet, being unregistered, she was not a recognized British ship, and was therefore liable without limitation. Amongst other remarks, he said p. 190, "It is in the first place, to be remembered that the limitation of liability is a creature of statute law; that upon general principles of jurisprudence and natural equity, as I think Dr. Lushington more than once said, the sufferer is entitled to a *restitutio in integrum* at the hands of the wrongdoer; that it is not a question of the launch being liable to a penalty for necessary non-registration, but a question whether she is entitled to a privilege which operates severely upon the sufferer, unless she brings herself strictly within the plain meaning of the provisions of the statute. Now, it appears to me, that however unfortunate it may be that the collision should have happened before the privilege of limitation of liability accrued, I think that it has so happened, and that with respect to this privilege at least, the Merchant Shipping Acts, from beginning to end, treat a registered British ship as the only recognised British ship

entitled to this privilege." And I find Lord Justice Brett in *Chapman v. Royal Netherlands Steam Navigation Co.*, L. R. 4 P. D. 184, referring to the same statute in these terms: "A statute, for the purposes of public policy, derogating to the extent of injustice from the legal rights of the parties, should be so construed as to do the least possible injustice. It should be so construed as to derogate as little as possible, consistently with its phraseology, from the otherwise legal rights of the parties."

The Canadian Act does not, in terms, profess to amend the Imperial Act. It makes certain substantive enactments, and repeals all provisions of the Imperial Act inconsistent with them. It did not, by the repeal of the Act under which the *Waubuno* was registered, take away any privilege to which her former registration entitled her. The former privileges remained and were extended, as far as such extension was effected by the Act; and the power existed to acquire further privileges, including that of limited responsibility, by registration under the Imperial Act, and the acquisition thereby and for all purposes, of the status of a British ship. I take the effect of the Canadian Act to be that for all purposes of that Act certain ships are not required to become recognized British ships under the Imperial Act; but I do not find, and I do not feel myself at liberty to import into the Act by construction, a declaration that all privileges awarded by the Imperial Act to recognized British vessels shall apply to such ships. To do this, and by such a process of reasoning to bring the *Waubuno* under the limitation clauses, would be, in my judgment, applying a very liberal and not a strict rule of construction.

In resisting the plaintiffs' demand for a writ of injunction Mr. Bethune pressed upon us that the defendant ought not to have been prevented from proceeding with her action in law, or that at furthest the injunction should have been confined to one of the three counts of her declaration, because it is intended to charge the plaintiffs with actual fault and privity, and that they are therefore

not entitled to the limitation under sec. 54 of the Merchant Shipping Amendment Act, 1862.

If the case had turned upon this objection I should have had no hesitation in holding that the injunction was properly granted. There is one count, and only one, which seems to charge at all directly what may be called a personal fault; but it, as well as the others, might be supported, if they are all maintainable by this administratrix, by proof of the misdeeds of individuals for whom the plaintiffs were responsible; and the affidavits deny actual fault or privity in the clearest manner, and are not answered.

It may be difficult to imagine a state of facts on which a corporation, whose vessel has foundered under circumstances which there is no living witness to describe, can be made liable, except upon grounds involving blame to its managing officials, but it is not impossible; and upon the materials before us it would be improper to surmise that actual fault or privity was intended to be insisted upon.

Agreeing as I do with the learned Chancellor upon this point, and agreeing in the main with the general views of the jurisdiction of the Court which he has expressed, I am yet of opinion that upon the other grounds which I have discussed, and which have assumed a prominence before us that was not given to them before his Lordship, the plaintiffs are not entitled to the injunction, and that we should therefore allow this appeal, with costs.

BURTON, J. A.—I am of the same opinion upon both points.

The 9th part of the Imperial Merchant Shipping Act of 1854, which contains the provisions limiting the liability of owners and regulating the proceedings in cases of several claims, is expressly declared not to extend to any British ship not being a recognized British ship within the meaning of that Act; and sec. 19 of that Act declares that no ship required to be registered, as by that Act provided, shall, unless registered be recognized as a British ship;

and the 30th and subsequent sections point out the places and manner of registering.

This vessel was not registered under the Imperial Act of 1854, but had been registered under the Canadian Act C. S. C. ch. 41. On the 17th March, 1874, the Merchant Shipping Act of Canada came into force, 36 Vic. ch. 128, which, by virtue of the authority reserved under the Imperial Act to Colonial Legislatures, repealed such portions of the Imperial Act as were inconsistent with its provisions, so far as related to ships registered in Canada.

Under this, chs. 41 and 42, of the Consolidated Statutes of Canada, were repealed.

Part 1 of the Canadian Act provided for the future measurement and registration of ships in Canada.

Sec. 8 provides that no ship propelled wholly or in part by steam, whatever her tonnage, shall be recognized in Canada as a British ship, nor be admitted to the privileges of a British ship in Canada until nor unless she be duly registered under the Imperial Act, as amended by that Act. Sec. 14, however, excepts vessels duly registered under the provisions of the repealed Act, ch. 41, previously to the said 17th March, and provides that such vessels need not be registered, except for the purpose of enabling them to proceed to sea as British ships.

The owners were not bound to register under the new Act, but were entitled to retain their former registry, and evidently their vessel would, I apprehend, be recognized in Canada as a British ship, and admitted to the privileges of a British ship in Canada. But does this confer upon them the limited liability created under the Imperial Act, and which is confined by the terms of that Act to British ships being recognized British ships within the meaning of that Act?

It appears to me that the owners of vessels had the option of retaining their original registrations or of re-registering; but if they desired to avail themselves of all the privileges of the Imperial Act, they were bound to re-register under the provisions as amended. That they have

not all the privileges of a British registered ship is clear, as, unless registered under the provisions of the new Act, they are liable to be detained if attempting to proceed to sea.

It has frequently been held that the limitation of liability, created by this and similar statutes, is not one to be favoured, inasmuch as it operates severely upon the sufferers, and that it is incumbent therefore upon parties seeking freedom from liability to bring themselves strictly within the words of the enactment.

This vessel is, by reason of the registration under the Act of Canada, ch. 41, and its recognition under 36 Vic. ch. 128, to be deemed a British ship in Canada without re-registration, but according to my reading of the Acts she is not a recognized British ship within the statute containing the limitation of liability.

Upon the other point also I think the plaintiffs fail. It is probable that upon the affidavits filed the learned Chancellor was quite justified in treating the action as one to which the limitation clauses would apply, but it seems to me that it never could have been intended that when a sufferer had selected her forum the defendants should be entitled to restrain her proceedings without bringing into Court or offering to secure the amount for which they would be liable in the event of the claim being sustained.

I have gone through a number of cases in the English Courts in which bills of this kind have been filed, most if not all of which are referred to in the judgment of my brother Patterson, in most of which, without admitting the claim of the particular claimant, the parties seeking to avail themselves of the benefit of the limited liability usually admit that they are answerable in damages to the extent and in the manner mentioned in part 9 of the Merchant Shipping Act of 1854, that it is insufficient to meet the claims, and that there was no personal default of the owner; and then, on placing themselves in a position to pay or secure the amount, the Court interferes and restrains all actions. It seems difficult to believe that the Legisla-

ture ever contemplated so extreme a course as that of restraining a sufferer from proceeding with his or her action except upon the terms of the alleged wrongdoer bringing into Court, or at least securing the limited amount of damages fixed by the statute, which, at the end of a tedious and expensive inquiry, might otherwise not be forthcoming.

Upon the first ground, however, I think the plaintiffs fail, and I think therefore, the appeal should be allowed, with costs, and the order for the injunction discharged.

ARMOUR J.—I think the appeal should be allowed, on the simple ground that there is no sufficient allegation in the plaintiffs' bill, showing the plaintiffs' ship to be "a recognized British Ship" within the meaning of "The Merchant Shipping Act, 1854," so as to entitle the plaintiffs to the limitation of liability claimed by them. Such an allegation might now be made by way of amendment, but there is no evidence before us to support such an allegation.

MORRISON, J.A., concurred.

Appeal allowed.

NOTE.—The Dominion Parliament has passed an Act, 43 Vic. c. 29, D., which came into force since this case was argued, repealing 31 Vic. c. 58, and extending limited liability to all ships, whether British, Canadian, or foreign.—REF.

CRUICKSHANK V. CORBEY.

Arbitration—Verbal appointment of arbitrators—Making submission a rule of Court.

The plaintiff and defendant agreed in writing to submit certain matters in dispute to an arbitrator, to be selected by a person named in the submission, who subsequently appointed the arbitrator verbally.

Held, per PATTERSON and MORRISON, JJ.A., affirming the judgment of OSLER, J., 30 C. P. 466, that the fact that the arbitrator was verbally appointed did not prevent the submission from being made a rule of Court.

Per BURTON, J.A., and ARMOUR, J., that the appointment not being in writing, it was a parol submission, and could not be made a rule of Court.

Appeal from a judgment of Osler, J., making absolute a rule *nisi* to set aside an award, reported in 30 C. P. 466.

Cruickshank, the respondent, having done some carpenter work for Corbey, the appellant, upon or in connection with houses which Corbey was building, part of which work was done under a contract and part of which was extra work, and having rendered to Corbey an account in which he charged the contract price and extras, and after crediting payments and deducting an allowance for contract work which had been dispensed with, brought down a balance of \$673.94, an agreement in writing was entered into, and signed by both parties in the following words: "Hamilton, February 17th, 1879—We hereby mutually agree to accept a party who shall be selected by C. W. Mulligan, Architect, to examine all the extras and items connected with four houses erected on Hughson Street, Hamilton, and we hereby bind ourselves to accept his decision as final and binding on both of us, and that we will not resort to any means of law after receiving such decision, and that the expenses of such arbitration shall be jointly paid by us."

Mulligan selected VanAllen as arbitrator, making the appointment verbally.

VanAllen made an award in the form of a letter addressed to Mulligan:—

"Hamilton April 12th, 1879.

"C. W. Mulligan, Esq.,

"Hamilton Ontario.

"Mr. R. Cruickshank, and Mr. Corbey, both of the City of Hamilton, having signed an agreement referring certain items in dispute between them to arbitration, and you to choose the arbitrator, you therefore having chosen me and the both parties above consenting, I have therefore examined the items in dispute, as referred to me by you, and after careful consideration to the best of my ability, I find Mr. Cruickshank is entitled to the sum of four hundred and fifty-nine dollars and sixteen cents.

"Yours most respectfully,

"ELI VAN ALLEN."

The document of 17th February was, upon 20th May 1879, made a rule of the Court of Common Pleas. The rule was drawn up in the following terms: "Upon reading the affidavit of Robert Cruickshank, and the copy of the agreement of reference thereto annexed, it is ordered, that the said agreement of reference made between Louis R. Corbey and Robert Cruickshank, bearing date the seventeenth day of February last past, be entered and made a rule of this Court, which said agreement is in the words and figures following, to wit:—" Then followed a copy of the document.

The affidavit referred to mentioned, amongst other things, the verbal appointment of VanAllen, and the making of the award, and that the original document of 17th February, was in the hands of Mulligan, who declined to produce it for the purpose of its being made a rule of Court.

Besides this affidavit, Cruickshank made another for the purpose of a motion to set aside the award. In it he gave details of the proceedings upon the reference, in some of which both litigants had taken part, and some of which he complained of as having taken place in his absence. He also showed that upon his application to VanAllen for information as to the way he had arrived at the sum awarded, he ascertained that \$120 had been deducted from his

account by way of damages for delay in completing the works beyond the time at which Mulligan had informed the arbitrator they were to have been ready. He complained of this, because he contended it was not a matter submitted, and because he could have shown, if an opportunity had been given him, that he was not properly chargeable with such damages.

Upon this affidavit, and another made by one William Allen, Cruickshank obtained a rule *nisi* to set aside the award for misconduct of the arbitrator in receiving evidence after the taking of evidence in the arbitration was finally closed, and in receiving evidence and suggestions from Corbey and from Mulligan in the absence of and without notice to Cruickshank; or to set aside the award, or so much thereof as charged Cruickshank, or deducted from his claim, the sum of \$120 for delay in completing the buildings.

Affidavits of Corbey, Mulligan, VanAllen, and others, and cross-examinations and affidavits in reply, were produced upon the argument of the rule before Osler, J., sitting for the Court; and in addition to the contest upon the merits, the rule was opposed upon the ground that the submission was not one which could be made a rule of Court, because the arbitrator was not named in the writing of 17th February, and was not appointed by any writing.

The learned Judge decided against Corbey, both on the merits and on the legal objection, and made the rule absolute to set aside the award.

The present appeal was from that decision.

The case was argued on the 19th May, 1880 (a).

Robinson, Q.C., and *A. Bruce*, for the appellant. The learned Judge whose decision is appealed from was wrong in entertaining the application to set aside the award, as the submission was not capable of being made a rule of Court. There is no question that a submission of future

(a) *Present*.—BURTON, PATTERSON, and MORRISON, JJ.A. and ARMOUR, J.

disputes, which does not name the arbitrator, cannot be made a rule of Court, but the learned Judge held that this rule does not apply where the submission is in reference to existing disputes. This decision is, however, opposed to the weight of authority: *Ex parte Glaysher*, 3 H. & C. 442; *Re Newton and Hetherington*, 19 C. B. N. S. 342; *Oliver v. Collings*, 11 East 367; *Osborne v. Wright*, 12 U. C. R. 65; *Re Wilcox and Storkey*, L. R. I C. P. 671; *Reynolds v. Burkhart*, 1 P. R. 213; *Russell on Awards*, 5th ed., 48, 55. It is true that arbitrators may appoint an umpire verbally, but there is in such a case a submission in writing to arbitrators named, which can be made a rule of Court, and the statute is thereby satisfied. The agreement in question here shews that the parties did not intend that it should be made a rule of Court: *Wadsworth v. Smith*, L. R. 6 Q. B. 332. On the merits, the award should not have been set aside, as the affidavits establish that the appellant's claim for loss by delay in the completion of the buildings in question was one of the matters referred to the arbitrator, and there was no such misconduct on the part of the arbitrator as to warrant the award being set aside. There is no case in which an award has been set aside on account of a remark made to the arbitrator by a third party totally unconnected with the parties to the arbitration. It is not pretended that the appellant had anything to do with the improper conduct, and the award certainly should not have been set aside with costs. They also cited *Re Hopper*, L. R. 2 Q. B. 367; *Mosley v. Simpson*, L. R. 18 Eq. 226; *Whitmore v. Smith*, 7 H. & N. 509 at p. 518; *Anderson v. Wallace*, 3 Cl. & F. 26; *Thorburn v. Barnes*, L. R. 2 C. P. at p. 395.

E. Martin, Q. C., for the respondent. It has long been established that a submission may be made a rule of Court where the arbitrator is verbally appointed. The cases shew that all that is necessary is an agreement to refer in writing, which we have in this case. Nor is there any good reason why anything more should be necessary. This Court cannot decide in favour of the appellant's contention without

overruling *Ray v. Durand*, 1 P. R. 27. But even if the submission was not properly made a rule of Court, not having been moved against or set aside, it cannot be questioned, and is sufficient to maintain the proceedings taken to set aside the award. The case of *Re Newton and Hetherington*, 19 C. B. N. S. 342, shews that *Ex parte Glaysher*, 3 H. & C. 442, can no longer be relied on as an authority. It is, however, unnecessary to add anything more on this point, as the question is fully dealt with by the learned Judge in the Court below: *Oliver v. Collings*, 11 East 367; *Re Bradshaw's Arbitration*, 12 Q. B. 562, p. 569; *Re Harper & Great Eastern R. W. Co.*, L. R. 20 Eq. 39; *Russell on Awards*, 5th ed., pp. 229. 563, 569, 581, 604; R. S. O., ch. 50, secs. 201, 202; *Duke of Buccleuch v. Metropolitan Board of Works*, L. R. 5 Ex. p. 230. *Osborne v. Wright*, 12 U. C. R. 65; *Re Story*, 7 A. & E. 602; It was clearly proved that the arbitrator misconducted himself by receiving evidence and communications after the reference was closed, in the respondent's absence and without his consent. If the evidence was illegal, it is unimportant what effect it may have had on the arbitrator. Besides, the agreement to refer gave him no power to deal with the question of delay: *McEdward v. Gordon*, 12 Gr. 333; *Williams v. Roblin*, 2 P. R. 234; *Waters v. Daly*, 2 P. R. 202; *Walker v. Frobisher*, 6 Ves. 70; *Dobson v. Grove*, 5 Q. B. 637; *Lawson v. Hutchison*, 19 Gr. 84; *Hubbard v. Union Fire Ins. Co.*, 44 U. C. R. 391; *Beddow v. Beddow*, L. R. 9 Ch. D. 89; *Malmesbury Railway Co. v. Budd*, L. R. 2 Ch. D. 113. If the Court below had no jurisdiction to entertain the application, then the rule appealed from is utterly void, and no appeal will lie thereon: *Ansell v. Evans*, 7 T. R. 1; *Fair v. McCrow*, 31 U. C. R. 599.

September 7, 1880. BURTON, J. A.—The preliminary objection which was taken before Mr. Justice Osler, on the motion before him, to set aside the award made between these parties, was renewed upon the appeal,

namely : that there was no such sufficient submission in writing as could be made a rule of Court ; and unless we are prepared to overrule *Ex parte Glaysher*, 3 H. & C. 442, which is treated in all the text books on the subject as a binding authority, I do not see my way to holding it such a submission as is contemplated by the statute.

It is said to be in effect overruled by the more recent cases of *Re Willcox and Storkey*, L. R. 1 C. P. 673, which proceeded upon the authority of *Re Newton and Hetherington*, 19 C. B. N. S. 342. But I think it will be found that neither of these cases is in conflict with the case in the Exchequer, and that the language used by some of the Judges tends to confirm it.

In the last of these cases, the arbitrator was named in writing by one of the parties in difference, under an agreement which provided that in case any difference should arise they should be referred to two arbitrators, one to be chosen by each party, and that if either should neglect to name one for seven days, the arbitrator so appointed should act for both, and that the submission of such arbitrators or arbitrator, might, at the instance of either party, be made a rule of Court.

There the arbitrator was named in writing. Whether he was to act alone or conjointly with others depended on a contingency. The deed itself provided for the mode of appointment ; the appointment was in writing, and that appointment, by the agreement of the parties, was to become the appointment of both on the refusal of one upon due notice to appoint an arbitrator on his part.

The question there was, whether the Court could take notice by affidavit that the contingency had happened before the happening of which the arbitrator appointed by one could act for both.

There was no difficulty therefore in making the deed and appointment, the whole of which was in writing, a rule of Court under the authority of the statute.

The case in L. R. 1 C. P. 673, also goes to support rather than to weaken *Re Glaysher*, as I read it. The agreement

referred the differences, should any arise, to one of certain named parties, giving authority to those parties to make the selection, and one of them was named *in writing* under that authority.

In the case of *Parkes v. Smith*, 15 Q. B. 297, the arbitrator was named in the deed of submission, the only question being, whether the statute extended to future differences, and the Court there held that the agreement mentioned in the indenture was a good submission, when the controversies actually arose. The case established in fact, that there is no distinction between a reference as to existing or to future differences, but that the agreement to refer, including the appointment of the arbitrator, must be in writing.

It is true that it is not absolutely necessary that the referees should be named in the agreement itself. It is sufficient if it provides for their appointment in a particular manner, and they are afterwards so appointed in writing. But although the agreement be by deed, if the appointment of the arbitrator be by parol, it will be only a parol submission, and so cannot be made a rule of Court under the authority of the statutes, which is the point decided, and as it appears to me necessarily decided, in *Ex parte Glaysher*, unless the Court can assume the function of legislation, and declare that a submission, though not in writing, may be made a rule of Court.

It is to be noted that in *Osborne v. Wright*, 12 U. C. R. 65, one of the cases referred to by the learned Judge, the question did not arise, as the motion there was to set aside the verdict entered, subject to a reference. There was a question whether the third arbitrator was or was not appointed, but no such question as is raised here could come up for decision on that application.

Nor do I think any argument can be drawn from secs. 201 and 202, of the Common Law Procedure Act, R. S. O. ch. 50.

Those sections make provision for supplying the place of an arbitrator refusing to act, or for the appointment by

a Judge in the event of default being made by either of the parties in making an appointment after agreeing to do so; and there being a sufficient agreement to refer the Courts now, under the power contained in that Act, instead of leaving the parties to an action for breach of an agreement, will, where there is a sufficient agreement in writing, and one party brings an action, restrain it upon being satisfied that no sufficient reason exists why the matters in dispute cannot be disposed of by an arbitration.

The tendency of legislation, as well as of the decisions of the Courts, has all been in late years to encourage references, and to compel parties where they have agreed to an arbitration to abide by their engagements.

But that, it seems to me, is entirely beside the present question, which is whether the submission here is a parol submission, and therefore one that cannot be made a rule of Court.

The section of the Common Law Procedure Act, under which it was sought to make it a rule of Court, is not very happily or grammatically expressed. It runs thus: every agreement or submission to arbitration whether by deed or writing, may &c.

These may be sometimes treated, as in the present case, as convertible terms, but there are occasions where they must be read as referring to distinct matters, an agreement to refer, and to an actual submission. The agreement to refer may in some cases be made a rule of Court, where no submission has been made; for instance, in cases where a motion is made to stay proceedings. *Moffat v. Cornelius*, 39 L. T. N. S. 102, is a case of that description. There was there a good agreement to refer, and there was nothing in that case to prevent the Court from appointing an arbitrator if proceedings had been taken under the Common Law Procedure Act.

And the language of Kelly, C. B., when delivering judgment upon another section of the same Act, in *Randell v. Thompson*, L. R. 1 Q. B. Div. 757, shews that the whole instrument in the present case, which is very similar to

the document? in that, except that the document there was addressed to the arbitrators by name, amounted to nothing more than a submission; and that here, as there, if the submission had been revoked, there would have been no existing agreement to refer.

"The present agreement," says the Chief Baron in that case, "is to refer a difference already existing to the arbitration of a person named. That agreement having been revoked, the *submission, which was all that it amounted to*, is at an end. This section enables the Court to interfere by a stay of proceedings in an action, notwithstanding the submission has been revoked, when there is an agreement still subsisting to refer the matter; but that contemplates an agreement to refer *in futuro* as distinct from the mere submission consequent thereon to a particular arbitrator named; and in such a case the revocation of the submission would leave the agreement to refer still existing. But in this case there was *no agreement beyond the mere submission to the arbitration of Mr. Williams*; and that having been revoked there is now no agreement to refer, and consequently the Court cannot interfere." And Denman, J., says, at p. 759, "I do not at all say that my opinion would have been the same if this were the case of an agreement to refer antecedent to the submission. Here the only agreement to refer is the actual submission to refer a particular matter to a named arbitrator."

The document signed by the parties in this case, which would have operated as a submission of existing differences if an arbitrator had been named in it, remained incomplete until that was done; and I find it difficult to see how this case can be called a submission by an instrument in writing.

It may, perhaps, be said that Mr. Russell, in his valuable book on Awards, has misapprehended the decision in *Ex parte Glaysher*, and that the text is not borne out by the actual facts of that case; but I find it referred to as authority for the position contended for by the learned editor of Williams' Saunders, who refers to the case in

C. B. N. S. and the recent case in L. R. 1 C. P. in connection with the same matter, as establishing that such an appointment, though contemplated by the written agreement, if not also made in writing is a submission by parol.

A case recently decided in the Court of Exchequer, in Ireland, *Roulstone v. The Alliance Insurance Company*, Ir. L. R. 4 Ex. 547, affirms the position that such a submission as that in *Ex parte Glaysher* is as a whole by parol, and cannot be made a rule of Court. That case was decided so lately as February of last year, and no doubt was thrown upon the correctness of the decision in *Ex parte Glaysher* by the counsel engaged, and was expressly recognized as good law by the Court.

I think there is nothing in the wording of the document itself to prevent its being made a rule of Court. In the case referred to of *Wadsworth v. Smith*, L. R. 6 Q. B. 337, it was expressly provided that there should be no appeal; words not to be found in the present agreement, which means nothing more, in my view, than that no action shall be brought in reference to the matters referred.

Upon the first objection, however, I think the appellant entitled to succeed; and I regret this the less because if, in point of fact, the arbitrator has exceeded his powers in awarding upon matters not referred to him, that objection is still open to the defendant; and upon the other grounds taken it appears to me to be excessively hard to make the appellant responsible for the conduct of parties over whom he had no control, and to visit him with the costs of the application.

The conversation with *Haskins* appears by the affidavits to have been purely accidental, and to have taken place without any communication with the appellant, and the arbitrator says that it was unsought for by him.

If the arbitrator had assumed to take evidence in the absence of the parties, or if it had appeared that *Haskins* had made the statements he did at the suggestion of the appellant, there might be a case made out for interference.;

but I think that to interfere upon the ground suggested would be going far beyond any modern decision. Cockburn, C.J., in a recent case says, we must not be over ready to set aside awards, unless we see there has been something radically wrong and vicious in the proceedings.

The alleged conversation appears to have been confined to the damages resulting from the delay, as to which, as I have already intimated, if the respondent's contention be correct, it is still open to him to urge it by pleading.

I think the learned Judge has misapprehended the evidence as to what occurred when the appellant allowed the arbitrator to go over the house, the evidence establishing that what he referred to was work within the contract, and not the subject of this arbitration.

I am of opinion, however, that the preliminary objection was fatal, and that the appeal should therefore be allowed with costs, and the rule *nisi* to set aside the award discharged.

PATTERSON, J.A.—I see no reason to take a different view of the merits, from that acted upon. Without following the discussion of all the objections, it is sufficient to say that the deduction of the sum of \$120 was, in my opinion, clearly unauthorized by the submission.

I propose, therefore, to confine myself for the present to the consideration of the legal objection raised to the interference of the Court.

The provisions of the English Common Law Procedure Act, 1854, and those of the Act 3 & 4 Wm. IV. c. 42, which were adopted into our Law, by the Upper Canada Statute, 7 Wm. IV. ch. 3., are now to be found, together with some later enactments, consolidated in the Revised Statutes of Ontario, ch. 50, from sec. 189.

The clauses taken from the Common Law Procedure Acts are not arranged exactly as they were, either in the English Act of 1854, or in our own Acts 19 Vic. ch. 43, or C. S. U. C. ch. 22. There have also been amendments made in some particulars which have rendered inapplicable some

of the English decisions; *e. g.*, cases such as *Jeffries v. Lovell*, 23 L. T. N. S. 782, and *Morgan v. Ainslie*, 28 L. T. N. S. 120, which related to compulsory references at *nisi prius*, and *Re Rouse and Meier*, L. R. 6 C. P. 212, on the subject of the power to revoke a submission.

It will therefore be useful to look for a little at a few of the clauses of our statute as it stands.

Sec. 201 provides generally that *every agreement or submission to arbitration* by consent, whether by deed or in writing not under seal, may on the application of any party thereto be made a rule or order of Court, unless *such agreement or submission* contains words purporting that the parties intended that it should not be made a rule or order of Court.

Secs. 202 and 203, settle the jurisdiction as between the different Courts.

Sec. 204 (altered from 7 Wm. IV. ch. 3,) provides, that in case of the appointment of any referee, arbitrator, or umpire, *by or in pursuance of any rule or order of Court, or by or in pursuance of any submission or reference* not containing words purporting that the parties intended that such *agreement* should not be made a rule or order of Court, the power and authority of such referee or arbitrator shall not be revocable without leave of the Court or Judge, * * and the Court or any Judge thereof, as the case may be, may, from time to time, *enlarge the time* for any such referee or arbitrators, to make their reward.

Sec. 211 provides for an arbitrator stating a case upon any compulsory reference under the Act, or upon any reference by consent of parties, when the submission *is or may be made a rule of Court*.

Sec. 212 enacts that the proceedings upon any such arbitration as last aforesaid shall, except otherwise directed by the Act, or by the *submission or document authorizing the reference*, be conducted in like manner and be subject to the same rules and enactments as to the power of the arbitrator, and of the Court, the attendance of witnesses, the production of documents, *enforcing or setting aside the*

award, or otherwise, as upon a reference made by consent under a rule of one of the Superior Courts, or the order of a Judge thereof.

Sec. 213 empowers the Court or a Judge to remit an award for reconsideration "in case in any reference to arbitration, whether under this Act or otherwise, *the submission is made a rule* of any Court."

This section, following sec. 164 of C. S. U. C. ch. 22, is worded differently from sec. 8 of the English Act of 1854, and is probably intended to express the effect of sec. 8, as construed in *Re Morris*, 6 E. & B. 387. The expression "*is made a rule*," &c., is not very accurate, as used in this and one or two other sections, because in strictness it fails to include references originally made by rule of Court.

Sec. 214 provides for staying proceedings in an action "whenever the parties, or any of the parties to any deed or instrument in writing, agree that any existing or future differences between them, or any of them, shall be referred to arbitration."

Secs. 215, 216, and 217, make provisions for supplying the place of arbitrators or umpires, either not appointed according to the *document authorizing the reference*, or refusing to act, or becoming incapable of acting, when the terms of the document do not show the intention that such vacancy should not be supplied.

Sec. 218 relates to the time for making an award by the arbitrator acting under any *such document or compulsory order of reference*, or under any order referring the award back.

Sec. 219 enables the Court of which such submission, document or order, *is made a rule or order*, or any Judge thereof, for good cause to be stated in the rule or order for enlargement, from time to time to enlarge the time for making the award.

It may here be noted, in passing, that in England it was considered that the power to enlarge the time for making an award, given to the Courts by 3 & 4 Wm. IV. ch. 42, sec. 39, could only be exercised after the submission had been

made a rule of Court. This appears from *dicta* in books of practice, and in cases, one of the earliest of which is *Lambert v. Hutchinson*, 2 M. & G. 858. It may be doubtful if this ruling would be strictly applicable to the clause as it appeared in C. S. U. C. ch. 22, sec. 179 where it was altered to make it better fit into the system introduced by the arbitration clauses of the C. L. P. Act, and as it now exists in sec. 204. But sec. 219, by the use of the words, *is made* a rule &c., clearly confines the power of enlargement which it bestows to cases where there is a rule of Court. This was not so in the C. S. U. C. ch. 22, sec. 172, which employed the phrase "has been or may be made a rule," &c., nor in the English C. L. P. Act, 1854, where the words were "is or may be made a rule," &c.,—at least if we are to read the words "may be made" as meaning "is capable of being made," which I believe to be the proper reading.

I may also note that the expressions "such submission, document, or order," are explained at page 145 of Russell on Arbitration to mean, in the English sec. 15, any submission by consent which may be made a rule of Court, or any order for a compulsory reference, or any order for referring an award back; and that that explanation applies to the same expression in our sec. 219 in its present arrangement among the clauses of the Revised Statute.

Sec. 221 is the last I shall refer to. It relates to any award made on any such submission, document, or order of reference, which directs possession of land to be delivered to any party; and empowers the Court of which the *document authorizing the reference is made* a rule or order to enforce performance of the award by its order.

This section, like sec. 219, varies the corresponding section of the former Act, C. S. U. C. ch. 22, sec. 174, by substituting the words "*is made* a rule," &c., for "*has been or may be made* a rule," &c., and in so doing it comes nearer to the more correct expression of sec. 16 of the English Act, which reads "*is or is made* a rule," &c. I take the words "*may be made* a rule," &c., both in our Acts, and in the English Act, to refer to submissions which under the

provisions of the statutes are permitted to be made rules of Court, and as to which certain powers are given, some of which may be exercised before the submission has actually been made a rule of any particular Court; such as the stating of a case by an arbitrator under our sec. 211, which agrees with the English sec. 5. Another construction which the words might bear would treat them as speaking as of the date when the Act was passed, and pointing to something to be done after that date, but before the power was to be operative. They are capable of being read in this sense as used in sec. 174 of the C. S. U. C., ch. 22, to which I have just alluded. This ambiguity is avoided by the expression in the English Act, "is or is made a rule," &c., which at the same time covers references made by rule of Court, and those made by consent, which have afterwards been made a rule of Court. Our sec. 219 also avoids the ambiguity, and is doubtless intended to include both cases; although it does not very precisely designate those originally made by rule of Court.

Proceeding now to consider whether, under the proper interpretation of sec. 201, it was lawful to make the document of 17th February, 1879, a rule of Court, and, upon that rule, to move to set aside the award made by the arbitrator verbally appointed by Mulligan, we must not, in construing the section, reject the light contributed by the sections which follow it.

The instruments which by sec. 201 may be made rules of the Court, are "every agreement or submission to arbitration by consent, whether by deed or in writing not under seal."

The effect of making such an instrument a rule of Court, I understand to be to give to the agreement evidenced by it the same force, and to bring it within the jurisdiction of the Court to the same extent, as if it had been, at Common Law, arrived at respecting the subject of a suit pending in Court, and had been embodied in a rule made in that suit. Thus in the early case of *Lucas v. Wilson*, 2 Burr. 701, we are told that the Court considered that the Act, 9 & 10,

Wm. III., ch. 15, was made to put submissions to arbitrations in cases where there was no cause depending, upon the same foot as those where there was a cause depending, and that Lord Mansfield held the Act to be declaratory of what the law was before, in cases where there was a cause depending in the Court.

I have not been able to find any authority for supposing that a rule of Court, referring the matters in dispute in a cause to the award of a person to be afterwards named, would not always have been valid and capable of being enforced. I find the forms of rules given in *Tidd* all adapted to cases in which the reference is to two persons who are named, and a third to be appointed by those two. If a Court having made a rule, upon consent of the parties to a suit, that they shall abide by the award of a person to be nominated in the manner directed by the rule, cannot afterwards enforce obedience to the award so made, it must be by reason of some mystery which I have not found any explanation of, and which is peculiar to this one class of rules.

In the arbitration clauses of our present C. L. P. Act, which I have cited, there is not only an entire absence of suggestion that the referee, if there is to be but one, must be appointed before there is what the Act calls a submission, or before the submission can be made a rule of Court, but that this is not essential plainly appears.

Thus we have sec. 204 providing for cases of the appointment of any referee, arbitrator, or umpire, by or *in pursuance of* any rule or order of Court, or by or *in pursuance of* any submission or reference.

We have the words "agreement or submission to arbitration," used in sec. 201, interpreted in a very wide and comprehensive sense in sec. 212 by the terms, "submission, or document authorizing the reference." It will be observed that sec. 212 refers to sec. 211, for it deals only with "such arbitration as last aforesaid;" and sec. 211 speaks of compulsory references under the Act, or references by consent of parties when the submission *is or may be made* a rule of Court; in other words, where it *is* a rule by having been

primarily made in a suit by rule, or by having been made by agreement in writing which has been afterwards made a rule, or where it *may be made* a rule—that is to say, is of the class which sec. 201 authorizes to be made rules of Court. The expression, “submission or document authorizing the reference,” therefore embraces rules of Court, and also agreements capable of being made, but not yet made, rules of Court. Then passing to secs. 215, 216, and 217, we find express provision for the appointment of referees when they have not been appointed by the “document authorizing the reference.”

The force of this term, “document authorizing the reference,” as including as well rules of Court as written agreements capable of being made rules of Court, is further shewn in sec. 221. As I have already suggested, we must give some liberality of construction to the words “*is made* a rule,” &c., in that section. To read them strictly would be to hold that an award made in pursuance of a reference by rule of Court in a suit, which decreed the delivery of possession of lands, could not be enforced by attachment; and that that remedy was given only where the reference had been under an agreement or submission which had been *made* a rule.

We must, in order to give full effect to the clause, understand the document authorizing the reference to include, as in the English Act, the rule itself when it is the only document, as well as any other written consent which is made a rule of Court.

Throughout the arbitration clauses the terms “submission” and “document authorizing the reference” are used interchangeably. This is particularly apparent from secs. 211, 212, and 221. The word “agreement” is treated as synonymous with them, except that it is not used to denote a reference by rule of Court.

The doctrine now contended for is that there cannot be a submission which can be made a rule of Court for the purpose of giving the Court jurisdiction to set aside the award, unless the referee is appointed in writing. The

submission, it is argued, means an agreement to submit to one or more persons who are named ; and, as under sec. 201 no agreement or submission can be made a rule of Court unless it is in writing, it is contended that it follows that without a nomination in writing of the referee, there is no complete submission, although there may be an agreement to refer, or, in other words, an agreement to make a submission.

This reasoning is, in my opinion, fallacious, because it treats the word "submission" as more restricted in its signification than the term which I take to be its synonyme, viz., "document authorizing the reference;" and because it gives no effect to the qualifying word "agreement" which is used in sec. 201 in conjunction with "submission."

I think it also mistakes the spirit and intention of the Act. I understand the purpose of the Act to be to afford greater facilities than formerly existed for settling disputes by arbitration, and to compel persons who agree that their differences shall be referred to arbitrators to abide by such agreements. If they have agreed upon their referee, they must submit to his decision. If they have merely agreed that existing or future disputes shall be referred to persons to be appointed in an agreed manner, they must be held to that agreement. In either case the agreement, if in writing, may, unless the contrary intention is manifested, be made a rule of Court, and enforced in the same manner as if originally embodied in a rule. In the language of sec. 212, the arbitration shall, except otherwise directed by the Act, be subject to the same rules as to (*inter alia*) enforcing or setting aside the award as upon a reference made by consent under a rule of one of the Superior Courts, or the order of a Judge thereof.

All the judicial remarks upon the object of the arbitration clauses I have happened to meet with advocate liberality of construction, and the giving of their full beneficial effect to the various provisions.

In *Re Lord*, 1 K. & J. 90, Wood, V.C., closed a discussion as to the retrospective effect of the statute by saying, p. 95,

“Therefore, regarding this statute as a means of remedying defects which impede the course of justice, in conformity with the predominating object of the parties that the matter should be settled by arbitration, I think that I am not infringing the rule laid down by Lord Bacon, (*Nova Constitutio, &c.*) in saying that, this being a remedial Act, I will give the benefit of it to all parties as far as possible.”

In *Livingston v. Ralli*, 5 E. & B. 132 Lord Campbell, p. 136, said, “There seems at one time to have prevailed in our Courts a horror of a domestic forum, which I can neither sympathise with nor account for; but the Legislature has recently, in the C. L. P. Act, 1854, made a provision for such cases—not that the agreement to refer shall be pleadable in bar, but that the Court may stop the action. This shows the opinion of the Legislature, that such agreements are not contrary to public policy.”

In *Willesford v. Watson*, 20 W. R. 32, L. R. 14 Eq. 572, Vice Chancellor Wickens, enforcing an agreement to refer, avowedly proceeded upon a liberal construction of the arbitration clauses; and Lord Selborne, affirming his order, said (L. R. 8 Chy. 480), “If parties choose to determine for themselves that they will have a domestic forum, instead of resorting to the ordinary Courts, then, since that Act of Parliament was passed, a *prima facie* duty is cast upon the Courts to act upon such an agreement.”

Sometimes the Courts have felt themselves compelled to hold that the arbitration clauses did not apply in particular cases, because the matter agreed to be referred was not a dispute or difference, but a valuation; as where one agrees to buy property at a price to be fixed by another person.

Two cases of this class were *Collins v. Collins*, 26 Beav. 306, and *Bos v. Helsham*, L. R. 2 Ex. 72. In the latter case Kelly, C. B., made the following remarks, p. 78: “I may observe that I think it a matter for regret that any subtle distinctions should prevail in cases concerning the arbitration clauses of the C. L. P. act 1854. In general it is highly desirable that when an arbitration of any sort has

been agreed on between parties, these clauses should be held to apply."

In *Re Storkey and Willcox*, L. R. 1 C. P. 671, Erle C. J., said, p. 674, "The 12th and 17th sections of the C. L. P. Act 1854, show a clear intention that parties who have agreed that their differences shall be settled by arbitration shall be compelled to abide by their engagements." Section 12 corresponds with our present section 215 and section 17 with our present section 201.

In *Law v. Garrett*, L. R. 8 Chy. D. 26, an agreement to refer was enforced by staying proceedings in an action, notwithstanding that the "domestic forum" was a tribunal in Russia.

If there had been no statute respecting arbitrations, and Cruickshank had brought an action against Corbey for the money he claims, there would have been nothing that I am aware of to prevent just such an agreement as that before us from being made in the action and embodied in a rule of Court. I have already given some reasons for this opinion. The statutes of Wm. III. and Wm. IV. as well as the C. L. P. Act, had for their object to afford a more liberal and not a more narrow practice than that which obtained at Common Law. The truth of this is illustrated by the case of *Parkes v. Smith*, 15 Q. B. 297, which was decided in 1850 before the C. L. P. Act was passed. One point in that case was the validity of an enlargement of the time for making an award, which had been granted by a Judge under 3 & 4 Wm. IV. c. 42 s. 39, and that turned upon the question whether there was a submission which could be made a rule of Court under 9 & 10 Wm. III. ch. 15. The deed on which the dispute arose contained the covenant, which is very common in partnership deeds, to submit any differences which should arise to the award of a person who was named in the deed. It was contended by counsel that this was not a submission, but only an agreement to make a submission when differences should arise; that an agreement to submit and an actual submission were not the same thing; and that to make the reference

effectual and authorize a rule of Court, it ought to appear that the parties had entered into a submission in writing in pursuance of their covenant. But the Court held that the agreement stated in the indenture was a good submission when controversies actually arose. It strikes me that if that covenant was properly held to be a good submission in writing of differences which had not arisen, and which could not be stated in the writing or defined otherwise than by a general reference to their subject—and no one has ever doubted the propriety or the wisdom of the decision—there should be no hesitation in holding that the document before us, which defined the matters in dispute and contained an express agreement to refer them to arbitration, providing at the same time for the mode of appointing the referee, satisfied the language of sec. 201, which does not use the word submission by itself, and is further explained as I have pointed out.

The cases decided under the C. L. P. Act, some of which I have cited, make it perfectly clear that, although the agreement in question, in *Parkes v. Smith*, happened to name the referee, any agreement of the kind whether it named the referee or not, would be acted upon by staying proceedings in an action and, if necessary, by appointing a referee; and I repeat that I cannot find any reason, either in the reading of the statute or in principle, for holding that the arbitration clauses deal in different ways with two kinds of documents authorizing a reference, or that any document fulfilling that description is excluded from the privilege of being made a rule of Court, unless the parties to it have evinced their intention that it shall not be made a rule of Court. Wherever there is a written agreement to refer, the intention I take to be to afford the aid of the Court in compelling adherence to the agreement, and in superintending and facilitating the various steps in the reference, and in reviewing the award when necessary.

Our legislation has gone further in this direction than the English, by giving an appeal in certain cases, as

well as by the other amendments made in the arbitration clauses of the statutes.

The written agreement being clearly in my apprehension, a "document authorizing a reference" within the meaning of the act, or, what I understand to be the same thing, an "agreement or submission to arbitration" within the meaning of those words in section 201, explained as I have endeavoured to point out by the context, I cannot see that it loses that character because Mr. Mulligan, who was at liberty to appoint either verbally or by writing, happened to make the appointment verbally.

There seems to me to be just as much necessity for the supervision and aid of the Court, and as little reason for refusing it, whichever mode of appointment happened to be adopted. The agreement of the parties to settle their dispute in that way was not affected. The argument for a different view depends, as I understand it, altogether on reading "agreement or submission to arbitration," in sec. 201, as meaning only a submission to a particular referee, and as not being satisfied by an agreement to refer to some one to be appointed. As I have already said, I find no satisfactory reason for so holding; and I think the view at once unnecessary for any practical purpose aimed at by the Act, and unduly restrictive of its intended operation.

For example, I see no reason why the Court should refuse to consider a case stated under sec. 211, by the arbitrator verbally appointed in pursuance of the written agreement to refer the disputes to the person so to be appointed.

The case of *Randell v. Thompson*, L. R. 1 Q. B. D. 748, is instructive on several points. It was an action for a builder's bill. An order had been made by a master for a stay of proceedings under sec. 11, of the C. L. P. Act, 1854, (which is followed by our sec. 214). The agreement was to refer to a particular individual, and was in the form of a letter addressed to him by the surveyors of the parties, who did so with the sanction of their respective principals. Thus, it was not contained in the building contract; it was

not signed by the parties themselves; and it had no more formality about it than the agreement we are dealing with. One of the parties revoked the authority of the referee before he made his award, and brought the action. Under our Act, section 204, the revocation would not have been effectual without leave of the Court, but it was held to be effectual in England, because, as decided in *Re Rouse and Meier*, L. R. 6 C. P. 212, the Act of 3 & 4 Wm. IV., which restrained revocation only when the submission contained an agreement that it should be made a rule of Court, was not, under the effect of sec. 17 of C. L. P. Act, 1854, (like our sec. 201) to be read as if that agreement were there. Then the submission to the particular referee being revoked, the arbitration could only have been proceeded with in case a new arbitrator was appointed, and it was also necessary to enlarge the time for making an award. The ultimate decision in effect was, that there being no submission beyond the agreement to refer to the particular person, no new arbitrator could be appointed by the Court, and there was therefore no existing submission or agreement to refer, which warranted the stay of proceedings in the action. This was the opinion of Quain and Field, JJ., in the Queen's Bench Division, and of the Court of Appeal, composed of Jessel, M.R., Kelly, C.B., Mellish, L.J., and Denman, J. In the Queen's Bench Division, Blackburn J., had taken a different view. One point decided, which it is useful to note, though aside from our present enquiry, was that the agreement to refer, in pursuance of which proceedings in an action will be stayed, need not be contained in the instrument out of which the matters in dispute arise. I refer to the case principally as an instance in which we have the two things, viz.: the agreement to refer and the submission to the named individual, kept separate in the discussion. Blackburn, J., *e. g.*, says, (p. 753), "The section talks of an agreement to refer; here there is an agreement to refer, although as a submission to a particular arbitrator it has been revoked," and Kelly, C. B., (at p. 757); "This section enables the Court to interfere by a stay of proceedings in

an action, notwithstanding the submission has been revoked, when there is an agreement still subsisting to refer the matters ; but that contemplates an agreement to refer *in futuro*, as distinct from the mere submission consequent thereon to a particular arbitrator named, and in such a case the revocation of the submission would leave the agreement to refer still existing." And Mellish, L. J. uses similar language.

It may be worth while to remark that, although we use a convenient expression when we speak of revoking a submission, and one which is not inaccurate, it is not the phrase employed in the statute, which speaks of revoking the authority of the arbitrator, not of revoking the submission, and therefore does not in this respect tend to narrow the construction which I have given to the word in sec. 201.

I take the whole discussion in the case to show this also : that if it had not been considered that, in the language of the English sec. 12, and our sec. 215, the terms of the document authorizing the reference showed an intention that the vacancy should not be supplied, no one doubted that a new arbitrator might have been appointed under sec. 12. In that event it would have resembled *Moffat v. Cornelius*, 39 L. T. N. S. 102 in which the Court of Appeal, composed of Bramwell, Cotton, and Thesiger, L.JJ., sustained the Queen's Bench Division, which had stayed proceedings in an action notwithstanding the refusal of one party to name an arbitrator, because there was an existing agreement to refer, which it was held could be enforced by the appointment of an arbitrator by the Court ; and thus, these instruments coming within sec. 12, or our sec. 215, as *documents authorizing the reference*, there is nothing in the cases in conflict with the argument I have founded on the use of those words.

I may refer also to a very recent case of *Piercy v. Young*, L. R. 14 Chy. D. 200, as exemplifying the distinction between a reference to a particular arbitrator, and a general agreement to refer to arbitration, in which the referee is not appointed. It was held in that case, that, while a

particular submission might be revoked, a general agreement to refer could not be revoked; but would, notwithstanding the attempt at revocation, be enforced by staying an action for the same matter which was agreed to be referred. This accords with what I have just called attention to, in the language respecting revocation of the *authority of the arbitrator*, not revocation of *the submission*.

The case chiefly relied upon as deciding that, in the matter before us, the submission is too incomplete to be made a rule of Court, because Mr. Mulligan happened to appoint the referee without writing him a letter to tell him he was appointed, is *Ex parte Glaysher*, 3 H. & C. 442. I intend to make some remarks upon that case; but before doing so I may observe that I think the idea of the necessity for having everything in writing is partly a traditional notion, arising from the caution observed in granting attachments for contempt of Court. That remedy, which was until recent times the only way to enforce an award under a rule of Court, does not now apply with us, to awards, for the payment of money, as we no longer imprison for debt. But awards directing some act to be done, such as the execution of a conveyance, or the delivery of possession of property, may still be enforced by attachment. That remedy would still be applicable also, as I apprehend, in case an action were proceeded with contrary to the terms of the submission, although the power to stay the action might usually be found more convenient. The case of *Hilton v. Hopwood*, 1 Marsh 66, shews that proceeding in an action will only be considered a contempt of Court when it has occurred after the submission has been made a rule of Court; and that, for the purpose of taking a step of the kind, the submission, if not made by rule of Court, must be made a rule of Court. This, I suppose, may always have been done, if necessity required it, at any time after the submission was executed; although, except for the purpose of giving the Court jurisdiction, there would have been no necessity for making it a rule of Court: 2 *Sellon's Prac.* 352. And I take it to be indisputable

that it might have been done while the appointment of the third arbitrator remained *in futuro*, as in the forms given by *Tidd*, or when the appointment of the sole arbitrator was *in futuro*, as in case of an agreement like that before us.

What was aimed at when an attachment was asked for was to secure certainty in the materials on which the Court was to act, because the proceeding was against the person. Formal proofs or written evidence may well have been insisted on in such cases. A verbal award would be good where the submission did not require it to be in writing. Mr. *Russell*, at p. 242 of his work, states as one objection to such an award that it is doubtful if the Court would enforce it by attachment. I imagine, however, though no case seems to have arisen which raised the question, that if it were made perfectly certain by the admission of both parties that the verbal award was truly stated to the Court, there could no sound reason be found for refusing to enforce, even by attachment, the rule of Court which enjoined obedience to such an award.

But where there is no question of the liberty of the person, as where the motion is to set aside and not to enforce an award, or where it is proposed to enforce it by *fi. fa.*, under recent legislative provisions, and not by attachment, I do not find the same rigid practice insisted upon. The different circumstances give the opportunity of administering the law in the spirit in which Courts are bound to apply remedial acts. Thus, in *Re Tunno and Bird*, 5 B. & Ad. 488, Parke, J., said, at p. 496: "Whether, under circumstances like these, an attachment would issue for non-performance of the award (it having been made a rule of Court) may be a different question; this is not the case of an attachment or an action, but a motion by one of the parties to set the award aside." And in *Doe v. Amey*, 8 M. & W. 565, in which an order was granted to pay over money awarded, for the purpose of issuing execution upon the order, Lord Abinger remarked respecting one ground on which the motion had been opposed, at p. 569: "As to

the necessity for an affidavit of the due enlargement of the time for making the award, it is true that that is required on motion for attachment, but that is because an attachment is a process against the person."

In the present case there is no question of attachment; and if there were, there is no uncertainty. We return from the discussion of this point, as from every other one, to the one ground of contention, viz., that in these words of section 201, "agreement or submission to arbitration," there is inevitably involved the nomination in writing of the referee.

In *Ex parte Glaysheer*, 3 H. & C. 442. there was an application to make the submission to arbitration a rule of Court, for the purpose of moving to set the award aside, on the ground that the umpire had omitted certain items. The reference had taken place under a covenant in a lease for referring future disputes to two arbitrators, to be appointed by the parties, which two arbitrators were to choose a third. The appointment had been made verbally. The judgment of the Court, after a *cur. adv. vult.* was given by Pollock, C. B., and is reported, in 3 H. & C. 445, in these words: "This was an application to make a rule of Court a covenant in a lease, by which the parties agreed that a certain valuation should be made by two indifferent persons; and in case of their disagreement in the amount, by a third person, to be chosen by them. There is an obvious distinction between an agreement to refer to an arbitrator *to be appointed* any matter of difference which may thereafter arise, and an agreement to refer to an arbitrator named a matter which has already become the subject of dispute. If there be a general agreement to refer future disputes to one or more persons to be appointed, and in pursuance of that disputes are referred, the submission is by parol, although the agreement is by deed, and a parol submission cannot be made a rule of Court. There will, therefore, be no rule."

The case is also reported in 34 L. J. Ex. 41; 10 Jur. N. S. 1208; 11 L. T. N. S. 638; and 13 W. R. 165.

The decision is, to my mind, unsatisfactory.

No doubt the Court refused to make a rule of Court of an agreement which, like that in *Parkes v. Smith*, provided for referring future disputes, but which, unlike that in *Parkes v. Smith*, did not name the referee ; and it proceeded, as seems also indisputable, upon the ground that there was no reference except by word of mouth.

I am more at a loss to understand what was the exact view of the arbitration clauses, and particularly of section 17 of the Act of 1854, which was acted on.

The observations which the reporters have noted as falling from the Judges when the motion was made, some of which were caught by one reporter and some by another, and the inclination of the Court to take time to consider, shew that the construction of the statute was not definitely settled, or that at least it was not familiar to all the Judges. And when the Chief Baron, in giving judgment on the day after the motion, explained, as reported in two of the books, that the Court had been pressed to give judgment that day because it was the last day for moving against the award, he gave a good reason, in addition to the internal evidence of the judgment he pronounced, why we should not regard the judgment as the result of a thorough consideration of the matter.

Two propositions are laid down. The five reports agree substantially as to the language in which the first was couched, although in some of them it has more emphasis than in the regular report. In the latter it reads thus : "There is an obvious distinction between an agreement to refer to an arbitrator *to be appointed* any matter of difference which may thereafter arise, and an agreement to refer to an arbitrator named a matter which has already become the subject of dispute." Note here the two things which are contrasted. First, an agreement which has both elements, the dispute and the appointment of the referee, future and contingent. Secondly, one in which *both* are present and certain : an existing dispute, and the reference of that dispute to a named person. The distinction

between these is obvious, but it cannot be maintained that the latter only can be the subject of such an agreement to refer as the Common Law Procedure Act provides for enforcing or regulating under the supervision of the Courts without, in my opinion, ignoring the spirit of that Act, and, as I understand the *ratio decidendi* of *Parkes v. Smith*, 15 Q. B. 297, conflicting with that decision.

The other proposition is thus reported in *Hurlstone and Coltman*: "If there be a general agreement to refer future disputes to one or more persons to be appointed, and in pursuance of that disputes are referred, the submission is by parol, although the agreement is by deed." This proposition, like the first one, evidently treats the thing called a reference as being necessarily a reference to a particular person. I do not quarrel with that as a matter of definition. But when it treats that reference as the only instrument which can be made a rule of Court, I respectfully submit that it misinterprets the law; and that, even if the proposition should be maintainable under the English law, it is not so under our law as now arranged in the Revised Statute. I think I may fairly cite the expressions of some of the Judges, as reported in this case of *Re Glaysher*, as indicating impressions of the subject similar to some which I have been arguing. It appears from the report in the *Jurist* that a motion was made, upon production of the lease only, and without any affidavit, to have the submission made a rule of Court, and that the Court suggested that it should be made on affidavit; and on the following day that was done, with the result which I have mentioned. On the first day Channell, B., asked if any action at law had been commenced upon the subject of dispute, and if that were not the only case in which such an application as that could be made.

From these questions I fancy there were two things connected in the mind of the learned Baron on which I have dwelt in support of my views, viz., that under sec. 11 of the English Act (our sec. 214,) an action would be stayed if brought for the same matter which the covenant

in the lease provided for referring: and that a document which under sec. 11 would authorize a stay of proceedings in an action, was one which, under sec. 17, (our sec. 201,) was permitted to be made a rule of Court.

On the second day, when the affidavit had been produced, and the facts were before the Court, Pigott, B., is reported (3 H. & C. 445) as calling attention to an important circumstance which the judgment given the next day did not touch, viz., the occurrence in sec. 17 of the word "agreement" as well as the word "submission." His dictum is thus noted: "Pigott, B.—If the words 'or submission' in the 17th section of the Common Law Procedure Act, 1854, be omitted, it would read thus: 'Every agreement to arbitration by consent,' that is, 'every agreement to refer' may be made a rule of any one of the Superior Courts." This is precisely the construction I contend for, and it gives operation to the sound canon which requires every word to receive its proper force.

After the best consideration I have been able to give to this case of *Re Glaysher*, my opinion is, that if it decides that an agreement to refer future disputes to a person to be named is not such an agreement or document authorizing a reference as may be made a rule of Court without the further act of naming the referee by a writing, it does not correctly lay down the law upon the subject as applicable to the practice of our Courts, and that we ought not to follow it. If necessary to find a distinction between it and the case before us, it is readily discovered in the fact that the agreement before us is to refer an existing dispute, and not a future or contingent one, as it was in that case.

I am unable to reconcile *Re Glaysher* with a case decided in the Common Pleas a year or two later: *Re Willcox and Storkey*, L. R. 1 C. P. 671. In that case the agreement was to refer future disputes to such one of the members of a firm of accountants as should be appointed by the firm to take the reference. It was not, it will be observed, a reference to the members of the firm or any one of them;

but, as in the case we are dealing with, a reference to a person to be designated by strangers, the difference between that agreement and this being only in limiting the range within which the choice was to be made. The firm appointed Mr. Tribe one of the members. We learn from an allusion in the judgment of the Court that he was appointed by writing. That circumstance is not stated in the head-note or in the report of the facts. The report sets out the material parts of the agreement, mentions that Mr. Tribe was appointed by the firm, and made his award; and that "the above agreement for reference" had been made a rule of Court. The motion was to set aside that rule. I do not gather that Mr. Tribe's appointment formed any part of the rule of Court. The application was made on the authority of *Re Glaysher*, but was refused. Willes, J., observed in the course of the argument, that the 12th and 13th secs. of the Act, which dealt with cases in which no arbitrator was appointed, used terms corresponding with those of sec. 17: a point which I have endeavoured to enforce, our corresponding secs. being 215, 216, and 201.

Erle, C.J., delivering the judgment of the Court said; "The language of the statute, the decision of this Court, and the expediency of the thing, are all opposed to this application. *Re Newton and Hetherington*, (19 C. B. N. S. 342,) is substantially the same as this case. The agreement is, that, in case any dispute should arise between the parties concerning any matter in any way relating to the subject matter, or the construction of the agreement, such dispute should be referred to such member of the firm of Barnard & Co., as should be appointed by that firm to undertake the reference. The firm in writing appointed Mr. Tribe, and he has made his award. I think there is enough in writing to be put on the files of the Court. It is not necessary that we should conflict with the decision of the Court of Exchequer in *Ex parte Glaysher*. I will only add that the 12th and 17th sections of the C. L. P. Act, 1854, show a clear intention, that parties who have agreed

that their differences shall be settled by arbitration, shall be compelled to abide by their engagements."

Now, although there happened to be in this case some writing appointing Mr. Tribe, and its existence enabled the Court to say they need not conflict with *Re Glaysher*, just as there happened in *Re Newton and Hetherington*, to be an appointment in writing of one arbitrator to act for both parties, although the Court received evidence by affidavit of the occurrence of the contingency which authorized that appointment, and so the particular point of *Re Glaysher*, was in that case also distinguished, I am not able to perceive how the submission was affected by Mr. Tribe being named in writing, any more than if he had been named by word of mouth only. The writing not being required by the agreement could only be important for one of two purposes, either as constituting a submission in writing by the parties, or as affording more certainty of the fact of the appointment than if it had been verbal. It was not a submission in writing by the parties, because it was the act of the strangers who were to select the referee. The agreement to refer to the person selected was as complete and as binding, whether the selection was noted in writing or not; and the agreement to refer, though it stopped short of what it is now contended is meant by a submission, was capable of being made a rule of Court, and as I understand the case was all that was made a rule. The writing doubtless tended to greater certainty in the evidence of the appointment, but that is only a question of evidence, not of jurisdiction; and, as in the case of a parol award, appeals only to the discretion, not the power of the Court. In principle I take *Re Willcox and Storkey* to be a strong authority for the validity of the rule of Court in the present case; and I take the concluding sentence of the judgment, which I have cited in an earlier part of my remarks, truly to expound the spirit in which the arbitration clauses ought to be dealt with.

But it has further been contended before us, that this agreement could not be made a rule of Court under sec. 201,

because it contains words purporting that the parties intended that it should not be made a rule of Court.

This argument refers to the words "we hereby bind ourselves to accept his decision as final and binding on both of us, *and that we will not resort to any means of law after receiving such decision.*"

We have to say what this means.

One thing is I think very clear indeed, and that is that the parties cannot have meant all they have said. It would be absurd to suppose they meant that the award should not be enforced by means of law, if the losing party disobeyed the decision; yet that is within the literal meaning of the words they have used.

The contention in effect is that they meant more than they said, because though the award must be capable of being enforced, they meant to impose a restriction on the mode in which that was to be done, and used this language by way of saying the submission should not be made a rule of Court. The action now taken by the respondent is the opposite of an attempt to enforce the award; but the objection could equally be made against a proceeding to enforce it, and the language must have the same meaning in one case as in the other.

I do not read the passage as expressing more than that the parties agree to settle their dispute by arbitration, in place of litigation in any other shape, and bind themselves to abide by and perform the decision of the arbitrator; provisions no more than equivalent to those found in every formal reference.

The case of *Wadsworth v. Smith*, L. R. 6 Q. B. 332, was cited to us. The words with which the Court had to deal in that case were "the fact of such delay or unsatisfactory conduct to be ascertained, and decided in writing by the architects, *against whose decision there shall be no appeal.*" The Court held that it was not a case of arbitration at all, but more like the ordinary clause that the certificate of the architect shall be conclusive; but three of the learned Judges considered

that if the agreement had amounted to a submission, the motion for a rule to deliver up the original agreement for the purpose of making it a rule of Court, as a submission, could not have succeeded, because the provision that there should be no appeal purported that the parties intended that it should not be made a rule of Court. It is useless to criticise closely this dictum, or to speculate upon how it should be applied in case it became necessary to make a submission containing similar words a rule of Court for the purpose of procuring an enlargement of time or other action prior to the making of an award, or for the purpose of enforcing the award. It would probably appear that it has been reported in too general terms, and that there was no rule laid down more extensive than that an agreement not to appeal from the decision of an arbitrator bound the parties not to take any steps in that direction; not that it involved an agreement that the document of submission should not be made a rule of Court for any purpose. I do not think there is anything in the case arising either from similarity in the language to that before us, or from anything said by the Judges, to afford a reason for reading this document as evidencing an intention that it should not be made a rule of Court.

I think the appeal should be dismissed, with costs.

MORRISON, J.A., concurred with Patterson, J.A.

ARMOUR, J.A.—I agree with my brother Burton that to enable the Court below to set aside VanAllen's award, the submission *to him* had to be made a rule of Court, but that this could not be done, his appointment not being in writing, but by parol only. It is unnecessary for me, holding this view, to express my opinion upon the other points raised.

Appeal dismissed.

HODGINS V. JOHNSTON.

Chattel Mortgage—Subsequent Purchaser—R. S. O., ch. 119, sec. 10.

Held, affirming the decision of the County Court, that the subsequent purchasers and mortgagees mentioned in sec. 10 of the Chattel Mortgage Act, R. S. O. ch. 119, are those becoming such after the expiration of a year from the filing of the mortgage.

Where therefore the mortgage was registered in August, 1878, and the plaintiff purchased the property in March, 1879, and the mortgage was not refiled: *Held*, that the plaintiff was not entitled, as against the defendant, who took the property from him in December, 1879.

An appeal from the County Court of Middlesex.

This was an action of trespass for the retaking of two colts, which originally belonged to Thomas and Hiram Sutton, who by mortgage dated 1st August, 1878, and registered on the following day, assigned them to the defendant Johnston.

In March, 1879, the plaintiff with knowledge of this mortgage, purchased the colts from the Suttons.

There was a refileing of the mortgage before the expiration of the year, but it was informal and ineffectual, and the case was treated as if there was no renewal.

On the 13th December, 1879, the defendant became aware that the mortgagor had improperly disposed of the property to the plaintiff, and on the 27th he took them from the possession of the plaintiff, which was the trespass and conversion complained of.

The learned Judge put two questions to the jury: 1st was the sale of colts by the Suttons to the plaintiff, a *bona fide* sale: 2nd, was the sale (if made) made with the consent of the defendant. The first being answered in the affirmative, the latter in the negative, the Judge entered the verdict for the defendant for the value of the colts, with leave to move to enter it for the plaintiff.

A rule having been obtained in term, was subsequently discharged, the learned Judge holding that the plaintiff was not a subsequent purchaser within the meaning of sec. 10 of the Chattel Mortgage Act.

The plaintiff appealed against that decision.

The case was argued on the 8th September, 1880 (a).

Meredith, Q. C., for the appellant. It is submitted that the learned Judge placed too limited a construction upon the term "subsequent purchasers" as used in the Chattel Mortgage Act, in confining it to purchasers after the expiration of the year. The authorities in our own Courts conclusively establish that the words apply to all purchasers for value after the execution of the mortgage: *McMartin v. McDougall*, 10 U. C. R. 399; *Courtis v. Webb*, 25 U. C. R. 576; *Boynton v. Boyd*, 12 C. P. 334; *Rose v. Hope*, 22 C. P. 482. The respondent will rely on *Meech v. Patchin*, 14 N. Y. 71, upon which the judgment in the Court below proceeded, but that case is opposed to all the authorities just referred to; and in *Day v. Munson*, 14 Ohio 488, the law was decided in favour of our present contention. The fact that the plaintiff had notice of the existence of the mortgage is not material: *Moffat v. Coulston*, 19 U. C. R. 341. The mortgage was also void as against the appellant because no certified copy of the mortgage was filed in the county of Middlesex within two months after the removal there of the colts.

Kerr, Q. C., for the respondents. The last objection is completely met by the case of *Clarke v. Bates*, 21 C. P. 348. If, however, a cause of action vested in the respondent when the appellant took possession of the colts, as we contend it did, he had a right to re-take them unless he was barred by the Chattel Mortgage Act through his omission to file a copy of the mortgage upon the expiration of the year. The cases which have been cited wholly fail to prove the necessity for this. Although the 10th section is not very happily worded, it is clear that purchasers subsequent to the expiration of the year are referred to. This is the construction which has been placed upon Acts similar to ours in the United States: *Case v. Jewett*, 13 Wis. 557; *Stephens v. Newell*, 14 Min. 228; *Newman v. Tymeson*, 12 Wis. 498; *Latimer v. Wheeler*, 30 Barb. 485; *Herman on Chattel Mortgages*, 192, 340, 370. The

(a) *Present*.—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

case so strongly relied on by the appellant, *Day v. Munson*, is not an authority at all, as that decision merely followed a similar construction which had been put upon the same words in a case decided previously to the passing of the statute, and it was expressly put upon that ground in the judgment.

September 10th, 1880. Moss, C.J.A.—The only question requiring consideration upon this appeal is, whether the holder of a perfectly valid chattel mortgage is obliged to file a copy before the expiration of a year, in order to keep alive his rights against a person who purchased from the mortgagor during the year.

It was indeed urged that his right was defeated because the goods had been, without his knowledge, removed by the purchaser to another county, and no certified copy had been there filed within the two months.

This contention was effectually disposed of by the considered judgment of the Common Pleas in *Clarke v. Bates*, 21 C. P. 348, where the Court held the statute to contemplate purchasers or mortgagees from the mortgagor, to whom the latter might sell or mortgage in the county to which the goods are removed. As the learned Chief Justice pointed out, the intention of the statute doubtless is to protect purchasers in the county to which they might be removed, and for that purpose it directs a registration there, allowing two months from the time of removal. The attempt to impugn the correctness of that view is in my judgment futile. But the decision is valuable, not merely because it determines a point now agitated again, but because it furnishes a key to the principle of construction, which in the opinion of the learned Judges who took part in that judgment ought to be applied to the statute. For my own part, I cannot doubt that, guided by the same spirit, they would have held that the subsequent purchasers or mortgagees mentioned in the 10th section of the Act (R. S. O. ch. 119), were those who acquired rights after the expiration of a year from the time of filing, and who were therefore entitled to regard the mortgage as no longer in existence.

In my opinion this construction accords with the recognized object, and with the express language of that enactment. What was the object of requiring the refileing with an appropriate statement sanctioned by an oath? Clearly to prevent mortgages, which had been wholly or partially satisfied, from remaining as apparent charges to their original extent. There was no intention of protecting persons who purchased or took mortgages, while the mortgage appeared to be in full vitality. Then what is the language used to effect this object? That unless refiled, the mortgage shall cease to be valid as against creditors and subsequent purchasers and mortgagees, for valuable consideration. Until the end of the year, it is to remain in force; then unless refiled it is to cease to be valid. Then the statute opens the door to creditors, whenever their claims arose, and to persons who subsequently became purchasers or mortgagees. The mortgage is not to be treated as null and void from its inception; it simply then expires. But that penalty upon neglect cannot deprive the mortgagee of his right against a purchaser from a mortgagor during the full validity of the mortgage. No more can it enable such a purchaser who has taken possession of the goods, and removed them beyond the mortgagee's control, and out of the county, to insist that because the mortgagee has not gone through the empty formality of refileing his security in a county where the goods are no longer to be found, he has forfeited his title. In this case, when the appellant took the goods in question they were in law the respondent's property, and there was immediately vested in him a right of action for their recovery. If after the expiration of a year from the original filing he commenced proceedings, he would have to rely upon his title as it stood at the time of the wrongful taking, not as it was against a creditor, or a subsequent purchaser at the date of issuing his writ.

I confess that the decision of this case seems to me to proceed upon elementary principles, the application of which is by no means doubtful. Similar views are generally entertained in the Courts of the United States I may refer to the

report of *Meech v. Patchin*, 14 N.Y., 71 where the correct principle is well expounded. Two decisions of our own Courts have been referred to in support of the appellant's position. At first sight they might seem to lend him some countenance, but when examined they are quite distinguishable. Much reliance has been placed upon an expression of Draper, C. J., in *Boynton v. Boyd*, 12 C. P. 334, where he intimated an opinion that a chattel mortgage which was not refiled would for that reason be cut out by a bill of sale, which was made within the year. This was at most an *obiter dictum*, wholly unessential to the disposition of the case, which proceeded upon other grounds; but it is further to be observed, that the reason why he seemed inclined to attribute this effect to the subsequent instrument, was that it was an assignment for the benefit of creditors. The only point to which he was directing his view was the validity of the mortgage as against creditors. There is not a word in the judgment which can fairly be appealed to on behalf of a mere purchaser within the year. The other case is *Courtis v. Webb*, 25 U. C. R. 576, which is very briefly reported. It would seem, however, that the decision was grounded upon *McMartin v. McDougall*, 10 U. C. R. 399, in which it was held that a bill of sale to secure a debt was avoided by another bill of sale assigning nearly the same goods to secure a smaller sum, presumably the balance of the original debt. Whether or not that point was well decided, it seems to have governed the judgment in *Courtis v. Webb*, where also a second mortgage was accepted upon the same property, to secure the same debt, and an additional sum.

I think, therefore, that both principle and authority are with the decision of the learned Judge of the County Court, and that the appeal should be dismissed, with costs.

BURTON, J. A.—Mr. Meredith in his able argument for the appellant stated that the general opinion in the profession since the passing of these Acts, has been to consider the words "subsequent purchasers" as extending to all persons becoming such after the execution of the mortgage, and

referred to some decisions in our own Courts, to which I shall presently allude, as supporting that view. I find myself unable to agree in his contention, nor do I think it is borne out by the cases to which he has called our attention.

The object or one of the objects contemplated by the Legislature in passing the Act in question, was to prevent subsequent purchasers being misled by the possession and apparent ownership of the mortgagor, and exposed to the risk of having their purchase defeated by a secret conveyance, of which they had no means of knowledge. We find them, therefore, directing by the first section, that every mortgage not accompanied by an immediate delivery, and actual and continued change of possession, shall be registered with certain formalities; and section 4 declares that unless so registered, it shall be absolutely null and void as against creditors, and as against subsequent purchasers in good faith for valuable consideration.

But by the 10th section, it is provided that the mortgage shall cease to be valid after the expiration of one year from the filing, unless previously renewed, as against creditors of the persons making the same, and against subsequent purchasers or mortgagees in good faith for value. And the question is, what is meant by these words? Is it that a purchaser, who became such purchaser with the full knowledge, or means of knowledge, that a valid mortgage then existed, shall be entitled to say that it has ceased to have validity, or do they apply only to a person who has become a purchaser since the expiration of a year, when by examining the records he would find that it had not been renewed, and that he might with safety therefore proceed with his purchase?

The section is ambiguously expressed. If the words "after the expiration of one year," had come in immediately after the words "cease to be valid," there could scarcely have been a question that it would have applied only to purchasers subsequently to the expiration of the year. But looking at the object of the Act, ought we to place any other construction upon it?

So far as persons in the position of the plaintiff are concerned, they suffer no detriment from this omission to renew. He had full notice of the defendant's mortgage, and that it was validly registered; and that the person in possession therefore, from whom he purchased, was not the owner. I think it would be a strained and forced construction, opposed to what I conceive to be the policy of these statutes, to hold the word subsequent to apply to any but purchasers becoming such after the time when the mortgage should, in order to preserve its validity, be renewed.

Such was the construction placed upon a clause similarly worded by the New York Court of Appeal, in *Meech v. Patchin*, 14 N.Y. 71; *Dillingham v. Ladue*, 35 Barb. 38, by the Supreme Court of the State of New York, 1860; *Gardner v. Smith*, 29 Barb. 68; *Hill v. Beebe*, 3 Kernan 556; *Latimer v. Wheeler*, 30 Barb. 480.

If the defendant had become aware of the sale to the plaintiff within the year, and had at once brought an action to recover it, he must have succeeded. This Mr. Meredith concedes, but he says, that is because the bringing the suit would be equivalent to taking possession. But this I take it, is not the true reason. The cause of action accrued when the purchaser took possession. The rights of the parties would have to be determined as they stood at that time, and it must be immaterial whether the action to enforce the plaintiff's right commenced one day before, or one day after the expiration of the year. And the cause of action once vested could not be defeated by an omission to do what in that case would have been a meaningless form.

See *Case v. Jewett*, 13 Wis. 557, and cases referred to in it,

A case in the State of Ohio, *Day v. Munson*, 14 Ohio, 488, was decided differently from those I have referred to in the New York Courts, but that is explained as based to some extent upon the fact that the words of a similar statute had received a judicial interpretation previously to the enactment of the Ohio Statute, and that the decision to

which I have referred, had been arrived at subsequently to the passing of the Act in Ohio, and that the Court were following a decision of the Ohio Courts which had become known, and acted upon as an established rule of property in that State for a long period.

I come now to the cases in our own Court, relied upon by the appellant. That of *Courtis v. Webb*, 25 U. C. R. 576, is very briefly reported, but seems to have been decided on the authority of *McMartin v. McDougall*, 10 U. C. R. 399, on the ground, apparently, that the first mortgage was extinguished by taking a second one in substitution.

The case of *Boynton v. Boyd*, 12 C. P. 334, was probably rightly decided, the *ratio decidendi* being that as against the defendants, who were execution creditors, the mortgage, if the plaintiff relied on it, was void for want of refiling; and if he claimed as absolute owner by reason of the conveyance to him of the equity of redemption, he failed by reason of the insufficiency of the affidavit of *bona fides* required by the statute. No such question as arises here was presented for adjudication.

The Chief Justice did, it is true, in the course of his judgment intimate an opinion, that the assignment for the benefit of creditors, made in that case a few days subsequent to the mortgage, placed the trustees under it in the same position as creditors, and that as the mortgage for want of refiling would have been invalid as against creditors, it would also be invalid as against trustees. It is not material to consider whether that opinion was well or ill-founded; the Chief Justice was particular in stating that it was a mere impression, and not a considered judgment upon the point, and it does not militate against the construction we are now placing upon the statute.

What did the plaintiff at most purchase when he bought from the mortgagor? Certainly he could not expect to be in a more favourable position than the person through whom he claimed, as to whom no renewal was necessary, and unless we are compelled to hold that the statute clearly gives him a different position, I should be most unwilling

to decide that he can avail himself of an omission to do what, as regards him, would have been a mere idle ceremony.

There are then no cases in our own Courts adopting a different construction. By adopting that which we consider the correct one, the object of the statute would, I think, be fully carried out viz.: making void as against subsequent purchasers a mortgage not renewed at the end of the year, as required by the 10th section, the intention in both cases being, to prevent intending purchasers being misled at the time of their purchase.

This is the view taken of the statute in the American cases to which I have referred, and one which commends itself to one's sense of justice.

If this view be correct, the appellant's last ground of appeal fails, as the respondent did establish his title to the colts at the time he took them from the appellant.

For these reasons I think the construction placed upon the Act by the learned Judge in the Court below was the correct one, and that this appeal should be dismissed, with costs.

PATTERSON and MORRISON, JJ.A., concurred.

Appeal dismissed.

COSGRAVE ET AL V. BOYLE.

Promissory note—Death of endorser—Notice of dishonour—37 Vic. ch. 47, sec. 1, D.

The plaintiffs discounted at a bank a note endorsed to them by S. Subsequently S. died, leaving the defendant his executor, who proved the will before the note matured. The bank, being unaware of the death of S., addressed a notice of protest to S., at the place where the note was dated, no other address having been given by him. The plaintiffs, who knew of S.'s death before the maturity of the note, took it up, and sued the defendant, without having given him any notice of dishonour.

Held, per BURTON and PATTERSON, JJ.A., affirming the judgment of the Q. B., 45 U. C. R. 32, that even if the notice was sufficient as between the bank and the defendant, it did not enure to the plaintiffs' benefit. *Per* MORRISON, J. A., and GALT, J., that the notice given by the bank was sufficient, and the plaintiffs were entitled to rely on it.

This was an appeal from a judgment of the Queen's Bench, discharging a rule *nisi* to set aside a verdict for the defendant, and to enter a verdict for the plaintiffs, reported 45 U. C. R. 32.

The facts were shortly as follows :

Mrs. Purdy was indebted to the plaintiffs, and made the note in question for that debt, payable to the order of one Stewart, who indorsed it to the plaintiffs for her accommodation and as her surety. The plaintiffs discounted the note in the Bank of Commerce. Stewart, the indorser, died, leaving the defendant his executor, who proved the will before the note matured. The plaintiffs knew of Stewart's death. The note fell due on the 8th of May, 1879, and was protested for non-payment by the notary of the bank, who was not aware of the death of Stewart, and who addressed notice of dishonor to Stewart at Toronto, where the note was dated. Stewart's post office address was not Toronto, but no other address had been given to the bank, and the notice was accordingly sent in pursuance of the Statute 37 Vict. ch. 47, sec. 1, D.

The Court of Queen's Bench, Armour, J., dissenting, held that the notice was insufficient, and that the plaintiffs were therefore not entitled to recover. From this decision the plaintiffs appealed.

The case was argued on the 31st of May, 1880 (*a*).

Robinson, Q. C., for the appellants. The point presented for the determination of the Court is a new one, as there is no authority upon the question in either the English Courts or our own. If, however, the bank, who were the holders of the note sued upon when it matured, gave a notice sufficient under 37 Vic. Ch. 47 sec. 1, D, to bind the defendants, and to enable the bank to sue upon the bill, as they clearly did, the notice so given enured to the benefit of the appellants; and they are entitled to recover, as the bank would have been had they brought this action. Nor can the fact that the appellants knew of the endorser's death deprive them of their right to rely on the notice given by the bank in ignorance of his death. The case of *Beale v. Parrish*, 20 N. Y. 408, referred to by the Chief Justice in the Court below, cannot be considered as an authority, as it has not been followed, and is apparently dissented from by text writers of high reputation. He cited *Daniel* on Negotiable Instruments, 2nd vol., secs. 987, 1058; *Parsons* on Notes and Bills, 2nd ed. 627. The convenience of commercial transactions requires that the law should be determined in favour of our contention.

J. K. Kerr, Q. C., for the respondent. The appellants never gave the notice required by law, nor do they shew any excuse therefor. It cannot be held that they are entitled to rely on the notice given by the bank, as they do not claim title through the bank, and even if they could take advantage of a proper notice given by the bank they cannot plead in excuse the ignorance by reason of which the bank did not give such a notice. Knowing, as the appellants did when they received notice, that the endorser was dead, they should have ascertained who his representative was, and addressed a notice to him at his residence, or at the post office nearest to which the note was dated, if they wished to rely on the statute. He cited *Brown v. Marsh*, 1 C. P. 447; *Smalley v. Wright*,

(*a*) *Present*.—BURTON, PATTERSON, and MORRISON, JJ.A., and GALT, J.

40 N. J. 471, 475; *Ogden v. Benas*, L. R. 9 C. P. 513; *Parsons on Bills and Notes* 2nd Ed. 501, 502; *Daniel on Negotiable Instruments*, vol. 2, p. 54, 55.

September 7, 1880. BURTON, J. A.—I was at first inclined to think with Mr. Justice Armour, the dissentient Judge in the Court below, that this case was not distinguishable in principle from *Ex parte Baker In re Bellman*, reported in L. R. 4 Ch. D. 795. A further consideration of the matter has led me to a different conclusion.

The contract of the indorser is only that he will be liable in the event of non-payment by the maker and due notice to him of dishonour, and I should suppose, notwithstanding the dicta to be found in the text books, that notice to him would be requisite, notwithstanding his bankruptcy; and that it would, at all events, be sufficient to enable the holder of the bill to rank on the estate. The contract is satisfied by notice to the endorser, and it does not, I think, lie in the power of the assignee to resist the proof on the ground that notice was not given also to him. But in the case of the death of the endorser the personal representative takes his place, and becomes, as it were, a party to the bill, and whilst subject to the liability thereby incurred, becomes so only on the same conditions as the party he represents was liable—that is to say, that he should receive notice within a reasonable time after the dishonour.

It was only necessary for the bank to give notice to such of the indorsers as they desired to look to for payment; and it was incumbent upon each indorser to see for himself that prior endorsers were duly fixed if he desired to have his remedy over against them.

It is not correct to assume that an indorser taking up a bill stands in all respects in the same position as the holder to whom he paid it. A stranger purchasing it from the holder, even with notice of an infirmity which might have affected it in the hands of the original parties to it, would not be affected by it, but would acquire all the rights of the party from whom he took it; but an indorser would acquire

no such fresh title, and any defence to which the bill would have been open in his hands originally, could still be set up against the bill after its re-transfer to him. No doubt, if due notice of dishonour has been given by the holder of the bill to all the parties to it, such notice will enure for the benefit of the indorser who retires it, but it is not by any means clear that where something has occurred which, as between the holder and an endorser, would excuse him from giving actual notice, the excuse for the omission will extend to other parties retiring the bill and for whom there is no such excuse.

I apprehend that if the bank had known of the decease of Stewart and the appointment of executors, it would not have been sufficient to send notice to the deceased either at his former place of residence or to the address which, under the statute, would have been sufficient during his life; and the plaintiffs retiring the bill would have been in no better position, unless they had taken steps in due time to give proper notice to the executors.

In the present case, having no such knowledge, the bank gave notice to the deceased in the terms of the statute; and this, I am inclined to think, would have been as effectual as in ordinary circumstances would be a notice sent to the last place of residence of the deceased, which, according to American authority, would entitle the bank to recover. But this is on the principle that, having no knowledge of the death, and having been guilty of no negligence, they were excused from giving any better notice. But this excuse, whilst applying to the bank, did not apply to the plaintiffs, and they stand, therefore, in the position of parties attempting to enforce a bill against an endorser to whom no notice of dishonour has been given, without any excuse available to them for omitting to give it. I think, therefore, that we cannot say that any sufficient grounds have been shown for interfering with the judgment of the Court below, and this appeal should be dismissed, with costs.

PATTERSON, J. A.—It is declared by section sec. 1 of 37 Vic. ch. 47, D., that, “Notice of the protest or dishonour of any bill of exchange or promissory note payable in Canada shall be sufficiently given, if addressed in due time to any party to such bill or note, entitled to such notice, at the place at which such bill or note is dated, unless any such party has, under his signature, on such bill or note, designated another place, when such notice shall be sufficiently given if addressed to him in due time, at such other place; and such notices so addressed shall be sufficient, although the place of residence of such party be other than either of such before mentioned places.” Under this clause, I think it is clear that, if Stewart had been alive, the notice would have been sufficient, and that it would have inured to the benefit of the plaintiffs.

The general rule may be quoted from *Byles on Bills*, at p. 290, of the 13th ed., 1879: “Notice by the holder, or by a party who is liable to be sued and may be entitled to sue, will enure to the benefit of all antecedent or subsequent parties.” There is a discussion in *Daniel on Negotiable Instruments*, sec. 987, to which we have been referred, as to whether antecedent parties occupy the same position as the holder when the latter has, after using due diligence, been unable to discover the address of the party entitled to notice, and has been, for this, or any similar reason, excused from giving notice. It is there said: “But it has been observed that it would seem to be still unsettled whether the notice inured to the benefit of the intermediate indorser, when the holder’s diligence in sending notice did not secure its actual reception. In the single American case deciding the question, which we have seen, it was held that the plaintiff could not avail himself of the diligence of the holder in such a case; and, ‘that there was no authority for holding that an excuse for the omission to serve notice by the holder should extend to other parties for whom there is no such excuse.’ But high authority has sustained the view that all the indorsers being liable to the holder, an intermediate indorser on paying him,

becomes substituted to his rights and is entitled to recover. And Thomson considers the doctrine settled to this effect." The high authority referred to, is *Parsons* on Notes and Bills, p. 627. The last reference is to *Thomson* on Bills, 327; and the single American case spoken of is *Beale v. Parrish*, decided by the Supreme Court of New York, in 1857, (24 Barb. 243) and by the Court of Appeals, which reversed the former decision, in 1859, (20 N. Y. 407).

In that case the parties to the note were all alive. The plaintiff had discounted it with a bank, whose notary, after due diligence, had failed to discover the address of the indorser; and therefore the notice which he sent did not reach the indorser.

The plaintiff, who knew the indorser's address, retired the note and sued him without having given any further notice of dishonour. It was held by the Court of Appeals that, although the bank could have recovered, the plaintiff could not recover, because the excuse which was sufficient for the bank was no excuse at all for him.

That decision commends itself to my judgment, as a correct application of the principles of the particular branch of mercantile law. But it does not appear to me to touch any question which can arise under our statute, which declares, not that the holder shall be excused from giving any better notice than one mailed to the address at which the note is dated, but that such a notice shall be sufficient. Its effect is to preclude any question of the sufficiency of the notice. Its terms are so wide and distinct as to make such a notice valid, even if given by a holder who knew perfectly well the address of the indorser, and that it was not that at which the note was dated; and that there was no probability of the notice reaching him. I take it that we must treat a notice mailed to the address designated by the statute, as of the same force and effect as if actually delivered at the true address of the party.

The question is, therefore, as I apprehend it, and as pointed out by Mr. Justice Armour in the Court below, narrowed to the discussion of the sufficiency, as against the

executor, of a notice duly mailed by the holder to the address of the testator, in ignorance of the testator's death; and if sufficient to render the executor liable to the holder, whether it inures to the benefit of the prior indorsee who knew of the testator's death.

The absence of precise authority on this subject is very remarkable. In the last edition of *Byles on Bills*, to which I have already referred, it is said, at p. 294, "If the party be dead, notice should be given to his personal representatives;" and in a note it is added: "I am aware of no actual English decision to this effect. But it has been so decided in America. And if there be no personal representatives, a notice sent to the residence of the deceased party's family is sufficient; *Merchants' Bank v. Birch*, 17 Johns. 25; *Bayley*, Am. ed. 418. It has also been held in America, that the administrator of an indorser, appointed before the maturity of the note, who has given due notice of his appointment, is entitled to notice. A notice addressed through the mail in due time, to the 'legal representative' of A., deceased, the indorser, to the last residence of the deceased, is sufficient, though it does not appear that the administrator or executor ever received it. See 6th American ed. of *Byles on Bills*, p. 440." The same doctrines are stated in section 1000 of *Daniel on Negotiable Instruments*; and in section 1001, it is said: "If there be no personal representative, notice sent to the family residence of the deceased will be sufficient; and it is likewise sufficient if notice be addressed to the deceased when, without negligence, the holder is not aware of his death." The authorities cited for these propositions are American decisions, some of which have been more particularly noticed by Hagarty, C. J., in his judgment in the Court below. The principle acted on seems to be that the person whose duty it is to give notice acquits himself of that duty when he has done all that with reasonable diligence he can do to secure the reception of the notice by the person entitled to it. In this case the bank, which was the holder of the note, being uninformed of Stewart's death,

could do no more than address and mail a notice to Stewart. It was, nevertheless, the fact that Stewart was no longer the party entitled to the notice, and so the statute no longer extended in its terms to make that notice sufficient.

It is my opinion, although it does not become essential to decide the point, that if the question were between the bank and the executor, it would be proper to hold that the spirit of the statute applied to give the notice the same effect as if it had been addressed to Stewart's family residence. But that effect would not be to establish a sufficient notice, in the sense in which that expression in the statute applies when the party is still alive; it would be rather to excuse the giving of the notice to the executor, which if he had been known he would have been entitled to. In this way the principle of *Beale v. Parrish*, 20 N.Y. 408, becomes applicable. If the plaintiffs had, equally with the bank, been ignorant of the death of Stewart, it might have been proper to hold that the notice given, being as good a notice as they could, under the circumstances, have themselves given, should inure to their benefit. But as they knew the facts, and were in communication with the family of the deceased respecting this very matter, and whether they were or were not informed that he had left a will and an executor they could easily have informed themselves, I perceive no reason to adopt a conclusion different from that of the majority of the Court below. I think that whether or not the bank would have been excused from giving any notice to the executor, the plaintiffs had no such excuse; and as the executor was not duly notified, there is no case presented for the application of the rule that notice given by the holder will inure to the benefit of other parties.

It may perhaps tend to a more satisfactory apprehension of the principle to consider it for a moment with more direct reference to the character of the contract created by the indorsement.

The indorser undertakes to pay if two events happen,

viz., the dishonour of the bill or note by the acceptor or maker, and due notice thereof given to himself.

The indorsee assumes the reciprocal obligation to duly notify the indorser, as a condition of holding him liable. This obligation he may, in general, discharge by doing all he can, with such information as he has or can with due diligence obtain, to secure the reception of the notice, even though it should fail to reach the indorser in due time or at all. At least we are at present assuming that to be the law. The first indorsee may indorse the bill to another, and it is part of the contract under the law merchant, that the first indorser thereby becomes liable to the second indorsee, on exactly similar terms as to the requisite of due notice or of proper efforts to give him due notice. If the second indorsee gives due notice, the first indorser has received what his contract required, and his liability to either first or second indorsee is fixed. But if the second indorsee fails to give him due notice, the contract of the first indorsee is unfulfilled unless he gives the notice himself. And even if the second indorsee's failure to secure the reception of notice has arisen from circumstances which excuse him and enable him to insist that he is in no default, it is hard to see how that can be set up by the first indorsee, either as a fulfilment of or dispensation from his immediate contract, one condition of which was that he should give due notice or at least do all in his power to do so.

I think there is as little reason as authority for holding that a condition, which in this case could well have been performed, is got rid of or essentially qualified by indorsing over the bill and abstaining from communicating to the indorsee the information on which he could himself have acted.

It strikes me that the explanation of the practice which is spoken of in *Ex parte Baker*, L. R. 4 Ch D. 795, as universal, and which, in that case, the Lords Justices declined to disturb, to give notice to the indorser himself, even when he has become bankrupt, and not necessarily to the assignee

or trustee, is that the contract effected by the indorsement is thus fulfilled. The notice is given to the person who by the contract was to get it. And this affords also a distinction between the effect of bankruptcy and that of death. In the one case the contracting party remains, and the contract can be fulfilled in its terms; in the other, the place of the contracting party has been taken by his representatives. The contract requires for its fulfilment that the notice shall be given to them, as pointed out by Mr. Justice Cameron in the Court below.

For these reasons, and without dwelling longer upon the subject, which was very fully discussed in the judgments delivered in the Court below, I am of opinion that we should dismiss this appeal, with costs.

MORRISON, J. A.—I am of opinion that this appeal should be allowed, and my judgment proceeds upon the ground stated by my brother Armour in the Court below: that the notice of dishonour given by the bank, the holder of the note, and addressed to Stewart, the endorser, was, under the circumstances, a good and sufficient notice, entitling the bank to recover against this defendant; and that being the case, such notice enured to the benefit of these plaintiffs, and so entitled them to maintain this action. The case may be shortly stated: The plaintiffs are second endorsers upon the note in question, which was discounted by the bank of Commerce, and not being paid at maturity the note was protested, and notices of dishonour were duly sent by the bank to the endorsers—the one to Stewart addressed to his name at Toronto, the place of the date of the note, no other place being designated by Stewart under his name. Stewart died before the note fell due, of which the bank had no notice or knowledge. The plaintiffs were, however, aware of the death of Stewart. They took up the note, paying the bank, and brought this action. Under these circumstances the defendant contends he is not liable as executor of Stewart. As remarked in the Court below, there is no judicial decision in the

Courts in England upon the question of notice in the case of a deceased endorser, and all that appears in text books is mere dicta, stating that in such a case notice should or may be given to the personal representatives of the deceased, if any, or addressed to the deceased at his last place of residence. In the American Courts there are various decisions bearing on the subject, but I cannot find in them any safe guide one way or the other.

Irrespective of English or American authority, our Legislature, by the Act of the 37th Vic. has made a most material alteration in the law, and the implied contract which existed between the holder and the endorser of a note—Parliament, no doubt, considering the unreasonable duties cast upon holders of bills and notes to ascertain the residence of drawers and endorsers, or the post office to which notices of dishonour should be addressed, and the injustice frequently resulting from the non-observance of the strict and technical rules of law in this respect, and in cases where no injury or prejudice was sustained by the party invoking a strict compliance with these rules, the Legislature very properly provided, in order to preclude all dispute as to the proper address of notices of dishonour, that such notices should be sufficient if addressed to the party at the place of the date of the note, unless such party had designated, under his signature on the note, that the notice should be addressed to some other place; so that if the holder of a note dated at Sarnia was quite well aware that the endorser was residing at Pembroke, at the other end of the Province, a notice would be sufficient if addressed to such endorser at Sarnia, if he omitted designating under his signature it should be addressed to him at Pembroke or some other place.

In the present case the note is dated at Toronto. Stewart did not reside in Toronto, and had not designated any place to which the notice should be addressed, and so, under the provisions of the statute, he waived the sending of the notice to his place of residence, that the holder was at liberty to address his notice of dishonour to Toronto.

The question before us is a novel one, and it is of vast importance to trade and commerce and the holders of negotiable paper that some plain rule should be laid down to guide parties in a case of this kind. It does not follow that because these plaintiffs omitted to give any notice of dishonour, they should lose their resort against their prior endorser or his estate. Parke, Baron, in delivering judgment in *Harrison v. Ruscoe*, 15 M. & W., p. 231, says : at p. 234, " Since the case of *Chapman v. Keene*, 4 A. & E. 103, it must be considered as perfectly settled that a notice of dishonour need not be given by the holder, but that he may avail himself of notice given in due time by any party to the bill ;" and refers to Chancellor Kent and Mr. Justice Story adopting that view. Mr. Story, at sec. 304 of his work on Bills, 4th ed., says : " And it may be laid down as universally true that a party entitled as holder to sue upon a bill may avail himself of the notice given in due time by any other party to it, against any other person upon the bill who would be liable to him if he, the holder, had himself given him due notice of dishonour." Now in this case it seems to me, under the provisions of our statute, that the notice given by the bank was a sufficient notice, rendering the estate of Stewart liable to pay this note, and that the bank had a right of action against these defendants ; and that being so, I can see no good reason why, upon the principle of the authorities I have referred to, the notice given by the bank should not enure to the benefit of these plaintiffs, and so entitle them to recover in this action.

It is said, however, that these plaintiffs, knowing of the death of Stewart, should have notified the bank of his death, or that they should have taken some steps to have the defendant notified of the dishonour of the note in due time. I cannot see that there was any legal duty cast upon the plaintiffs to notify the bank, the holders, of Stewart's death. These plaintiffs, as in thousands of cases, relied upon the bank, the holders, giving sufficient notice to fix the liability of the prior endorser, or his representatives.

I have looked at the various American decisions referred to, but, considering the effect and policy of our statute, they do not satisfy me that these plaintiffs ought not to succeed; and, in the absence of any binding authority, I think we should hold that the notice here was a sufficient notice to fix the liability of the defendant, and that the plaintiffs, having taken up the note and become the holders thereof, such notice enured to their benefit, although they had knowledge of the death of the prior endorser, Stewart, before the maturity of the note, upon the ground that under our statute Stewart waived the sending of notice to his place of residence by his not designating that it should be sent there. Before the 37 Vic, if Stewart had, under his name, waived notice, which was frequently done, we would not, I think, have held that on account of his death before the maturity of the note, the holder was bound to give notice to the personal representatives.

I think the appeal should be allowed.

GALT, J.—This case is of the first impression, and being of great importance to the mercantile community, I feel constrained to express my views. It is unnecessary to recapitulate the circumstances, as the facts are clearly set forth in the judgment of the Court below. The question is, whether a notice mailed by the holder of a bill or note, addressed to an endorser who is dead, is a good and valid notice to bind his executor, the notice being addressed to the place where the note is dated, such place not being the place of residence of the deceased nor of his executor, the holder not being aware of the death of the endorser. In the present case, although the holder of the note was ignorant of the death of the deceased, the plaintiffs were aware of his death; but this makes no difference, as they are entitled to rely on the notice given by the holder, if that was sufficient. By 37 Vic. ch. 47, D., it is recited and enacted, "Whereas it is desirable that the law relating to bills of exchange and promissory notes should be amended in the particulars in this Act mentioned: Therefore &c.,

“Notice of the protest or dishonour of any bill of exchange or promissory note, payable in Canada, shall be sufficiently given, if addressed in due time, to any party to such bill or note, entitled to such notice, at the place where such bill or note is dated, unless any such party has, under his signature, on such bill or note designated another place where such notice shall be sufficiently given, if addressed to him, in due time, at such other place; and such notices, so addressed shall be sufficient, although the place of residence of such party be other than either of such before mentioned places.” A reference to the numerous decisions to be found in every treatise on bills of exchange and promissory notes will shew the expediency of such an enactment.

There being no similar statute in England, we are without authority as to the interpretation thereof by the Courts of that country, and being called upon for the first time to express an opinion on the meaning to be attached to it, I feel bound to say that, in my judgment, a notice given in due time, addressed to any party to a bill of exchange or promissory note, at any address sufficient to bind him, will also bind his executors and administrator, if the holder is ignorant of his death; the words of the statute being, that such a notice so addressed shall “be sufficiently given”; which expression appears to me to mean that no other notice of any kind is required; because, if such be not the case, the notice is not “sufficiently given.”

I understood, on the argument, that it was admitted that if the bank, who were the holders of the note at the time it fell due, and who were the parties giving the notice, could have recovered on the notice given in this case, the plaintiff could also recover; but if I am in error as respects this having been admitted, I consider this point has been conclusively settled by authority, and I find none in which it has been held that any party to a note or bill, who is not himself the holder at the date of its dishonour, is obliged himself to give notice to his prior endorser. He may rely on the holder having given such notice, subject of course to his own claim being defeated if it be shewn no such

notice was given. It is most desirable that no uncertainty should exist as to the rights and duties of parties to these instruments, and I very much fear, if a distinction is made between a notice to an endorser and a notice to his executors, in case of his death, the evil which the 37 Vic. was intended to remedy will still prevail.

The case of *Exparte Baker*, L. R. 4 Ch. D. 795, appears to me very strongly to support the view that such a notice, irrespective of the statute, would bind the executors. The reasons given by both the Lords Justices apply equally to them as to trustees in bankruptcy; and moreover there is no such statutory declaration in England, that a notice addressed to any party to a note at the place at which such note is dated, shall be held to be "sufficiently given."

In *Byles* on Bills, 13th ed. p. 294, it is laid down, "If the party be dead notice should be given to his personal representatives." In a note to this passage it is stated, "I am aware of no actual English decision to this effect. But it has been so decided in America; and if there be no personal representatives, a notice sent to the residence of the deceased party's family is sufficient: *Merchants' Bank v. Birch*, 17 Johns R., 25." On referring to this case we find it laid down by Spence, C. J., p. 26: "If an endorser be dead at the maturity of a note, and there be executors or administrators, at that time, *known to the holder*, notice must be given to them, for they represent the testator or intestate, and are as fully entitled to notice as he would be, if alive. But it is a novel principle, unsupported either by precedent or authority, that notice is to be given to the representatives of the endorser, and who became such long after the note has fallen due. *The rights of the holder of a note or bill are to be determined by his acts when the note or bill becomes due*; and if he then gives such notice as, under the existing state of facts, the law requires of him, his rights are fixed, and he cannot be required to superadd any other notice at a future period." If the foregoing opinion be correct it is decisive of this case. At the time when the note became due the bank, who were

then the holders of the note, had no knowledge of the death of the endorser, and gave a notice in due time, addressed to him in a manner which has been expressly declared to be sufficient by 37 Vic.

This appeal should be allowed.

Appeal dismissed.

MADDEN V. COX.

Bill of exchange—Drawn on president of company—Personal liability.

Section 5 of 16 Vic., ch. 241, gives power to the Midland Railway Co. to become parties to bills, and enacts: "Any bill of exchange drawn, accepted, or endorsed by the president of the company, with the countersignature of the secretary of the company, or any two of the directors of the company, and under the authority of a quorum of a majority of the directors, shall be binding upon the company, and every * * bill of exchange * * accepted * * by the president of the company, or any two of the directors as such, with the countersignature of the secretary, shall be presumed to have been properly * * accepted * * for the company until the contrary be shewn * * nor shall the president or directors, of the company so * * accepting * * be thereby subjected individually to any liability whatever."

A bill of exchange addressed, "To the President Midland Railway, Port Hope," was accepted as follows: "For the Midland Railway of Canada: accepted; H. Read, secretary; Geo. A. Cox, President," the latter being then the president of the company.

Held, per BURTON, J.A., and OSLER, J., affirming the judgment of the Queen's Bench, 44 U. C. R. 542, that the defendant Cox was personally liable. *Per* PATTERSON and MORRISON, J.J.A., that he was not so liable.

APPEAL from the Court of Queen's Bench, discharging a rule *nisi* to set aside a verdict for the plaintiff, and to enter it for the defendant Cox, reported 44 U. C. R. 542.

This was an action on a bill of exchange drawn by the defendant Hurden, addressed "To the President Midland Railway, Port Hope," and accepted by the defendant Cox,

who was president of the company when the bill was presented for acceptance, in the following form: "For the Midland Railway of Canada. Accepted.

"H. READ, Secretary.

"GEO. A. COX, President."

It was shewn at the trial at Walkerton, before Galt, J., that the bill was for supplies to the Midland Railway Company: that the defendant Cox was president, and Read, secretary, and that the company usually accepted bills in that form.

By section 5 of ch. 241 16 Vic., the charter of the Midland Railway Company, the company are authorized to become parties to notes and bills, and it is there enacted that any bill accepted by the president with the counter-signature of the secretary or any two of the directors, and under the authority of a majority of a quorum of the directors, shall be binding on the company, and every bill accepted by the president as such, with such counter-signature, shall be presumed to have been properly accepted for the company, until the contrary be shewn: that the seal shall be unnecessary, nor shall the president, &c., so accepting be individually liable.

The case was argued on the 18th May, 1880 (*a*).

The Court of Queen's Bench, Cameron, J., dissenting, held that the defendant was personally liable; and the defendant appealed.

Kerr, Q.C., for the appellant. It is clearly indicated on the face of the bill that the defendant did not intend to make himself personally liable for the acceptance in question, which was simply for the company, and was in the form authorized by section 5 of their Act of incorporation, which expressly declares that he shall not be liable on such an acceptance. The bill was not addressed to him by name, and it was necessary to prove by parol testimony that he was the president of the company; so that on the face of the bill it did not

(*a*) *Present*.—BURTON, PATTERSON, MORRISON, JJ.A., and OSLER, J.

appear that he was personally requested to accept ; and the fact that the acceptance was in the form prescribed by statute to bind the company, is strong evidence to prove that he did not accept in his individual capacity. If oral evidence was admissible to shew that Cox was the president, it was open to him to shew that the draft was for supplies furnished to the company, and was accepted by him in his official character. That it was so regarded by the holders at maturity, is proved by the fact that they sent notice of protest to the company. The plaintiff cannot complain, as he must have understood that by such an acceptance the defendant's intention was to bind the company and not himself: *Okell v. Charles*, 34 L. T. N. S. 824; *Hagarty v. Squier*, 42 U. C. R. 168; *Robertson v. Glass*, 20 C. P. 250; *Laing v. Taylor*, 26 C. P. 416; *Murray v. The East India Co.*, 5 B. & Ald. 204; *Gilbert v. McAnnany*, 28 U. C. R. 384; *Gadd v. Houghton*, L. R. 1 Ex. D. 357; *Neale v. Turton*, 4 Bing. 149; *Davis v. Clarke*, 6 Q. B. 16; *Alexander v. Sizer*, L. R. 4 Ex. 105; *City Bank v. Cheney*, 15 U. C. R. 400; *Deslandes v. Gregory*, 2 E. & E. 602; *Wake v. Harrop*, 6 H. & N. 768; *Herald v. Connah*, 34 L. T. N. S. 886; *Daniel on Negotiable Instruments*, 2nd ed., secs. 405, 415.

C. Robinson, Q. C., for the respondent. We are not dealing with a promissory note here, and the cases relating to promissory notes which have been cited have no application, for, as pointed out in *Okell v. Charles*, 34 L. T. N. S. 824, "a promissory note is a totally different thing from a bill of exchange, which incorporates in the acceptance the person on whom it is drawn." In *Daniel on Negotiable Instruments* it is said, at sec. 412, that there can be but one acceptor of a bill, and that person must be the drawee, unless he be an acceptor for honor. The first question to be determined then is, who was the drawee, as no one can be liable on a bill of exchange except the person on whom it is drawn. Now it is clear that this bill was not drawn on the company, but upon the defendant

who was president, and the company could not therefore be liable as acceptors: *Chalmers* on Bills of Exchange, p. 32; *Mare v. Charles*, 5 E. & B. 981. At Common Law this corporation had no power to become parties to bills, and the statute only allowed them this privilege under certain circumstances, when the company is the drawee, and it does not provide that the company shall be liable on a bill not drawn upon them. It is of no consequence for what purpose the bill was given, and no enquiry as to that should have been allowed. The commercial transactions of the country are carried on by bills of exchange, and it is of the greatest importance that there should be certainty as to who is liable as acceptor: *In re Bellman*, L. R. 4 Chy. D. 795. It would have been very easy to draw upon the company by their corporate name if it was so intended, and for the defendant to insist on the bill being so drawn. He also cited *Dutton v. Marsh*, L. R. 6 Q. B. 361; *Herald v. Connah*, 34 L. T. N. S. 886; *Bateman v. Mid-wales R. W. Co.*, L. R. 1 C. P. 499; *Ex parte Overend Gurney & Co.*, L. R. 4 Chy. 460; *Laing v. Taylor*, 26 C. P. 416; *Balfour v. Ernest*, 5 C. B. N. S. 601.

September 7th, 1880. BURTON, J. A.—The question is, whether in the manner in which this bill has been accepted, the defendant has avoided a personal liability. It was, as I understood, admitted that if the bill had been addressed to the defendant by name, adding his official description, he would have been liable personally, but it is urged, that being addressed simply to the president and accepted in a manner which would have been sufficient to render the company responsible, if the bill had been addressed to them, that circumstance conveyed a clear indication that the defendant did not intend to incur a personal responsibility, and that no such liability has been incurred.

If a bill so drawn can be regarded as a bill drawn upon the company, then I think the acceptance a sufficient acceptance to bind them and exempt the officials accepting

from any personal liability, but I am unable to bring myself to the conclusion that it is a bill upon the company.

A dictum of the learned Chief Justice of the Common Pleas, in the case of *Gilbert v. McAnnan*y, 28 U. C. R. 389, is referred to by some of my learned brothers as establishing that this may be regarded as a bill upon the company.

In that case the action was against the defendant Glass personally. The bill was drawn by the plaintiff payable to his own order, addressed to James Glass, Secretary Richardson Gold Mining Company, and was accepted thus: "Accepted, the Richardson Gold Mining Company, per James Glass." It is quite clear that the defendant could not be liable on such an acceptance, for he had not accepted it; neither could the company be liable, for there is no authority for holding a party liable as acceptor upon a bill addressed to another, with the sole exception of a bill accepted for honor. I may add that it was not necessary for the decision of that case to consider the effect of such an acceptance as binding on the company, but I do not think that the cases referred to by the Chief Justice of *Murray v. The East India Co.*, 5 B. & Ald. 204, and *Neale v. Turton*, 4 Bing. 149, can be regarded as authorities for his conclusion.

The bill in the first case was directed to the Honourable Court of Directors of the affairs of the United Company of merchants trading to the East Indies in London, and it was accepted by the secretary by order of the Court.

Upon the motion for a new trial, a verdict having passed for the plaintiffs, the Court directed the facts to be stated in a special case, which stated that the bills were drawn in the usual form in which bills were drawn upon the East India Company at home, and were accepted in the usual manner by the order of the Court of Directors, and that all bills were so accepted and paid—such bills having been accepted and paid to the extent of many millions. No question was raised as to whether the bills were properly addressed to the company, but the point argued under the

plea of *non assumpsit* was, that no parol promise could be made to bind a corporation—an objection which the Court disposed of during the argument, holding that whenever an Act of Parliament authorizes a corporation to draw and accept bills, it must be taken to give the holder of them the same remedy against the body corporate, as the law gives in other cases against other parties to bills. No point was raised as to the bill not being drawn upon the company, and it was assumed that the bill was drawn in proper form, and the only question as to this part of the case was, whether *assumpsit* would lie against a body corporate upon a bill duly accepted so as to bind them. *Neale v. Turton*, 4 Bing. 149, was not the case of an incorporated company, and the case went off on other points.

The remaining case referred to by the learned Chief Justice was *Penrose v. Martyr*, E. B. & E. 499, but it appears to me to be no authority for the contention that a bill addressed as this is, is a bill upon the company.

There the bill purported to be drawn *upon the company*, omitting the word “limited,” and was accepted in this form, “Accepted, payable at Messrs. Barclay & Co., Bankers. John Martyr, secretary to the said company.” The Joint Stock Act under which the company was registered, enacted that, if any officer of a limited company signs on behalf of such company any bill of exchange without mentioning the word “limited,” he should be personally liable.

The action was brought against the officer under the statute; the draft was upon the company, and purported to be accepted by the secretary on their behalf; and so having signed on their behalf, without adding the words required by the statute, he became personally responsible. But upon the argument of that case, the Court took occasion to refer to *Mare v. Charles*, 5 E. & B., 978, the converse of that case, where the draft was addressed to the defendant personally and he accepted in terms which left it ambiguous whether he accepted for himself or for the company, and where the Court thought it a strong ground

for construing the acceptance as binding on himself, as it would otherwise have been inoperative.

In *Bult v. Morrell*, 12 A. & E. 746, the company was not incorporated, but was working under a Deed of Settlements, and the bill in question there was drawn upon the directors of the company, and was in fact accepted by three of the directors and the manager. It was contended that the manager was liable, as the bill was in fact a bill upon the company, and that Parker, the manager, though not a director, was one of the company.

The Court held that it was not a bill upon the company. Had it been so, that fact, if it had existed, might have let in evidence that the directors had power to bind the other shareholders, but a bill in that form could be accepted and be binding only on the directors.

The cases referred to on promissory notes, have little or no application. In the case of a note drawn in the usual form—I, or we promise to pay—the signature of the president and secretary, in the mode pointed out by the statute, would take the place of the seal, and the instrument would be binding on the company, not on the individuals; but apart from the statute where directors have signed a note in this form, “We, the directors of the Isle of Man Slate Company, limited, do promise to pay J. D. £600,” and at one corner affixed the seal of the company, the directors were held to be personally liable as makers, for there was nothing in the note itself to exclude this personal liability; and the fact that the company’s seal was affixed, was not sufficient to show that it was signed on behalf of the company: *Dutton v. Marsh et al.*, L. R. 6 Q. B. 361.

In that case the money was lent to the company, and it is important as showing that the note purporting to be made by the directors, was not in effect the note of the company, and so is opposed to the dictum I have referred to, and that the placing of the company’s seal to the note was not equivalent to saying “on behalf of the company,” but was treated as placed there simply for the purpose of ear-marking the transaction, or in fact showing that as

between the directors and the company, it was for the company they were signing the note.

The learned Chief Justice, Sir Alexander Cockburn, quotes approvingly from Smith's L. C. 6th ed. p. 344, the following passage, as what he understands to be the law: "In all these cases, the question whether the person actually signing the contract is to be deemed to be contracting personally or as agent only, depends upon the intention of the parties as discoverable from the contract itself; and it may be laid down as a general rule, that when a person signs a contract in his own name without qualification, he is *primâ facie* to be deemed to be a person contracting personally; and in order to prevent his liability from attaching, it must be apparent from the other portions of the document that he did not intend to bind himself as principal."

It was upon this principle that the defendant was held not liable in *Alexander v. Sizer*, L. R. 4 Ex. 102. It was perfectly manifest that he was signing as the agent of the company and on their behalf. That was also the case of a promissory note, but the law in reference to acceptances is very different. No person but the drawee can be liable as acceptor (with the single exception to which I have referred.) Here the bill was not addressed to the company, but to the president, and because extraneous evidence had to be admitted to show that the defendant filled that office, the dissenting Judge in the Court below seems to have been of opinion that, parol testimony being once admitted, it was open to him to show that, it was in that character, and not personally or as his individual act that he signed the bill. I dissent from that view of the law. The parol evidence was admissible to shew that the person who signed as president was or was not in fact president, but not to vary his contract. If the bill was addressed to him and accepted by him, it becomes his acceptance, and words of mere description or qualification are not enough to exonerate him.

Bills of exchange are all drawn on the intended accep-

tor in a personal character, and if he accepts he must be held to have done so in that character, and to be liable no matter what words of mere description may be added to his name.

That this bill was not addressed to the company, or in any way so as to bind the company, is to my mind clear. Can it make the slightest difference as regards the liability of this defendant as acceptor, whether it was addressed to him by name or by description of the office which he filled?

Would the Colonel of the 47th be liable on a bill addressed to him merely as the Colonel commanding the 47th regiment, but accepted by name, adding his rank or official character? The question admits to my mind but of one reply.

I cannot see that the question is in the slightest degree affected by the section of the Act under which certain officials are empowered with the authority of the Board of Directors to accept bills for the company. That section was not intended to effect any change in the law merchant in reference to bills of exchange, but simply substituted this mode of acceptance for the more cumbrous process of affixing the seal.

The company would not be liable upon a bill drawn upon John Smith or John Brown, or upon a bill incomplete for want of any address, merely because the president and secretary, with the authority of the board, choose to accept it in the manner pointed out in the statute? It is true that they would not incur any personal liability upon a bill so accepted, because it is one of the essentials of a bill of exchange that there must be a drawee, and the drawee is the only person who can accept. How then does this differ in principle from such cases as *Mare v. Charles*? In that case the bill itself purported to be drawn on account of goods supplied to the company. It differs in fact from this to this extent, that it was drawn upon an officer of the company by name, adding his official description, instead of on the officer by his name of office,

as here, and was accepted in this form "For the company—James Charles, Purser."

The defendant here must be taken to have known the law merchant, and that such an acceptance as he gave would not bind the company. But he intended to accept. He cannot be heard to say that he gave the holder an acceptance that would bind no one, or that he intended the holder to regard it as a refusal to accept. He never intended that the bill should be dishonoured for non-acceptance.

I think, therefore, we are deciding strictly in accordance with the decided cases, when we hold that this was a personal acceptance of the defendant; and that the words "for the company," and the counter signature of the secretary were merely intended to ear-mark the transaction, and would not, any more than the seal was held to do in *Dutton v. Marsh*, L. R. 6 Q. B. 361, indicate that it was signed on behalf of the company. The plaintiff's counsel objected to the reception of the evidence as to the resolution authorizing acceptances by the defendant and the secretary, instead of establishing, as I have no doubt he could have done by the examination of that witness affirmatively, that the defendant had no authority to sign this acceptance for the company, which would have been an additional reason for inferring that he intended to contract personally.

I think it, however, clear that the defendant did not intend to give a void security; it can only be valid by treating it as his acceptance; and I agree with the majority of the Court below, that we should strive to give effect to it.

I think, therefore, the judgment should be affirmed, and this appeal dismissed, with costs.

PATTERSON, J. A.—The defendant Hurdon having supplied goods to the Midland Railway Company of Canada to the amount of \$631.80, drew the bill of exchange upon which the questions arise, addressing it "To the President Midland Railway, Port Hope."

The defendant Cox was the president of the company when the bill was presented for acceptance, and I suppose

he was president when it was drawn, though that fact is not expressly stated. H. Read was the secretary of the company. Read wrote across the bill "For the Midland Railway of Canada, accepted;" and signed "H. Read, secretary," Mr. Cox signing under Read's signature, "Geo. A. Cox, president.

It must be obvious to every one that neither Read nor Cox ever intended to assume personal liability to pay the money. There is no pretence of charging Read, because his signature speaks for itself as being attached only in his official capacity, and no process of deduction can attribute to the drawer any idea of including him in the address of the bill. The signature of Cox bears exactly the same tokens of being merely official; but it is said he was the president, therefore the word president in the address must be taken to mean Geo. A. Cox, and he must be held liable on his acceptance.

The foundation on which this liability is supported is, under these circumstances, so unreal and technical, and so foreign to what any person concerned can be supposed to have contemplated, that it cannot be accepted as sound, without careful examination.

It is indisputable that (except in the case of acceptance, *supra protest*, for the honour of the drawer or an indorser) a bill can only be accepted by the drawee; and this doctrine has often led to persons who have signed acceptances with very little idea that they were incurring personal responsibility, finding themselves made liable. Among the cases in which our own Courts have so decided, that of *The Bank of Montreal v. DeLatre*, 5 U. C. R. 362, may be called the leading case. *Foster v. Geddes*, 14 U. C. R. 239, and *The Bank of Montreal v. Smart*, 10 C. P. 15, were decided on facts which were taken to be similar to those in DeLatre's case. In these cases, and in every case in which the drawee has been held liable, so far as the reports have come under my notice, the bill was addressed to the person by name, either with or without the addition of his office. There are cases, to some of which I

shall have occasion to refer, in which bills have been directed to officers by their official name only, as "To the Directors," or "To the Cashier," and in which actions have been brought against the individual officer. I do not recollect that in any of these cases the company represented by the officer was a corporation; and I do not remember an instance in which the action succeeded. It may have failed for reasons not inconsistent with the opinion that the bill was well drawn upon the individual, and even that he accepted in his individual capacity only; probably *Bult v. Morrell*, 12 A. & E. 746, is a case of this kind; but still I think the fact is, that there is no reported case in which a recovery has been had against the individual.

The plaintiff's case here involves two propositions, the affirmative of which lies on him: First, that Mr. Cox is the drawee of the bill; Secondly, that his acceptance must be taken as his personal act, and not as something done merely in his official character and on behalf of the company.

In my judgment the plaintiff has failed to establish either of these propositions. It was essential to his success that he should establish them both. If he fails as to either of them he fails altogether. I shall, therefore, examine them separately, and shall begin with the second, which relates to the character of the acceptance, because we shall thus be at once brought to consider the statute which governs the making of bills or notes by the company.

The present name of the company was given to it in 1869 by the Act of Ontario, 33 Vict. ch. 31. It had been incorporated in 1846, by 10 Vict. ch. 109, as the Peterborough and Port Hope Railway Co., which name it bore in 1853, when the Act 16 Vict. ch. 241, was passed. The fifth section of that Act declared and enacted that the company should have power to become parties to promissory notes and bills of exchange: that any note made or endorsed, and any bill drawn, accepted, or indorsed by the president of the company with the counter signature of

the secretary of the company, or any two of the directors of the company, and under the authority of a majority of a quorum of the directors, should be binding upon the company : that every note or bill made, drawn, accepted, or indorsed by the president of the company or any two of the directors as such, with the counter signature of the secretary, should be presumed to have been properly made, drawn, accepted, or indorsed for the company until the contrary should be shown; that in no case should it be necessary to have the seal of the company affixed to any such bill or note, nor should the president, or directors, or secretary of the company so making, drawing, accepting, or indorsing, or assisting to make, draw, accept, or indorse any such note or bill, be thereby subjected individually to any liability whatever.

The act done here by the president and secretary, is precisely what the statute declares shall be the act of the company, and shall not involve the officers in personal liability. It is in its form, and under the effect of the statute, the acceptance of the company. Whether or not the company could have successfully maintained that the form of the address being to the president was conclusive against the contention that the bill was drawn on the company, and so have escaped liability notwithstanding the fact that the bill was treated as drawn on the company by the officers who accepted it, it is clear to my mind that those officers, by the form of their acceptance, declared to the drawer or his indorsee that they accepted for the company.

The sanction of a majority of a quorum of directors is required to authorize an acceptance by the president ; but the statute creates a presumption that the acceptance is so authorized until the contrary is shown. The onus of rebutting this presumption was on the plaintiff, who made no attempt to rebut it. The defendant appears to have unnecessarily undertaken to show authority or ratification, for which purpose he offered in evidence some resolutions of the directors of a date later than that of the accep-

tance; but this evidence was on the plaintiff's objection ruled out. There was thus no evidence on the subject; and no fact has been found respecting it, nor has any point touching the question been made before us. The statutory presumption therefore prevails, and it is useless to speculate as to what would have been sufficient evidence in rebuttal, or whether the absence of a formal resolution, if it had turned out there was none, would have been enough. See *Currier v. Ottawa Gas Co.*, 18 C. P. 202.

I am not able to distinguish this acceptance in principle or legal effect from that which was the subject of adjudication in *Robertson v. Glass*, 20 C. P. 250. In that case a bill had been drawn on James Glass, Esq., secretary Richardson Gold Mining Co., and it was accepted in these words: "Accepted—The Richardson Gold Mining Company, per J. Glass." The Court of Common Pleas held that Mr. Glass was not personally bound by this acceptance. It had been decided by the Court of Queen's Bench in *Gilbert v. McAnnany*, 28 U. C. R. 384, in an action against the trustees of the company upon the same acceptance, that the Richardson Gold Mining Company was not liable because it had no power to accept bills. Mr. Justice Wilson, in giving the judgment of the Court in that case, held that the bill was drawn on the company. The Court of Common Pleas, in *Robertson v. Glass*, 20 C. P. 250, seemed to have hesitation in accepting that view, and without expressing dissent from it, appeared rather to incline to the opinion that the bill ought to be treated as drawn upon Mr. Glass personally, but decided that he could not be taken to have accepted it in any other character than as secretary. In the judgment of Mr. Justice Gwynne, the following passage occurs at p. 253: "Now it seems plain that it is the company which is intended to be bound, and that the acceptance is the acceptance of an incorporated company, per their secretary; but coupling the terms of the acceptance with the admission in the declaration that it was *in his character* of secretary of the company that the bill was drawn upon the defendant, there can, I think, be no reasonable doubt

that all idea of personal liability is excluded." And Hagarty, C. J., at p. 255, said, "The acceptance is certainly, as far as words go, the acceptance of the Richardson Company. The Court of Queen's Bench seems to hold that the bill is also addressed to the company. Without resting on that expression, I am prepared to hold that defendant did not accept this bill so as to bind himself."

I do not see how to avoid holding that an acceptance such as that before us, made in the manner which the statute directs, is not an acceptance of the company as plainly as when, in a case which derived no assistance from statute law, the secretary wrote the words which were used in Glass's case, or that the officers did not in the one case as well as in the other disclaim personal liability. I am dealing with the question at present as if the bill was addressed to the defendant Cox by name, but as president, and as if his acceptance without such disclaimer would have bound him individually. It was in that way I understand the Court of Common Pleas to have dealt with Glass's case. I think that case was properly decided. If it should be urged in this case that the acceptance ought not to be held to have been made on behalf of the company, under the statute, when the bill, not being drawn on the company, was not one which the company could properly accept—a point which I do not recollect having been made on the argument—my answer would be that that does not touch the question of the form of the acceptance and its effect as intimating that the parties were not acting in their individual character; and that the same element existed in Glass's case in a more distinct form, because he acted in the name of a company which had no power to accept, and was, *a fortiori*, unauthorized to accept in its name.

I do not agree, however, that the statute only protects the officers when the company is bound. I think the personal immunity applies when they act and profess to act in their official character, and that we could not hold otherwise without adding to the statute.

I refer also to a case of *The Bank of Montreal v. Smart*,

10 C. P. 15, in which Draper, C. J., had to consider the liability of gentlemen sued as drawer and acceptor of a bill, with reference to a statute exactly similar to the one we are dealing with. There is nothing, however, to be said of the case as an authority upon the present one, further than that so far as any view of the statute, which had not been complied with by either of the parties, was stated, I think it was in accordance with what I have attempted to express.

Then there are other cases, some of which have often been cited in our Courts, which arose under the English Joint Stock Companies Acts. The Act of 1856 (19 & 20 Vict. ch. 47,) contained in sec. 43, a provision that "a promissory note or bill of exchange shall be deemed to have been made accepted or indorsed on behalf of any company registered under this Act, if made, accepted or indorsed in the name of the company by any person acting under the express or implied authority of the company." In *Lindus v. Melrose*, 2 H. & N. 293, 3 H. & N. 177, three directors of a company were sued upon a promissory note worded thus: "Three months after date we jointly promise to pay Mr. Frederick Shaw or order £600, for value received in stock on account of the London and Birmingham Iron and Hardware Company, limited." This was signed by the three, with the addition of the word "Directors," after a bracket, which included the names. It was held, both in the Exchequer and Exchequer Chamber, that the note bound the company and not the parties who signed it, as being (notwithstanding the use of the word "jointly," which created some difficulty) made in the name of the company, within the meaning of the statute. In *Alexander v. Sizer*, L. R. 4 Ex. 102, the note was worded: "On demand I promise to pay," and was signed "For Mistle, Thorpe, and Walton Railway Company—John Sizer, secretary." This was held to be the note of the company and not of Sizer the secretary. The principle on which these cases were decided, and which is affirmed in other cases less directly in point, as *Penkivill*

v. *Connell*, 5 Ex. 381, *Allen v. Sea, Fire, and Life Assurance Co.*, 9 C. B. 574, to which I may add cases in our own Courts, such as *City Bank v. Cheney*, 15 U. C. R. 400, and *The Bank of Montreal v. Smart*, 10 C. P. 15, would fully warrant the holding that a promissory note signed in the form of this acceptance, even if the words used were, "We promise to pay," would be the note of the company and not of the officers who signed it. The reasoning of Kelly, C. B., and Pigott, B., in *Alexander v. Sizer*, is instructive on this point, particularly in the stress laid upon the addition of the word "secretary," indicating that Sizer signed *as* secretary of the company, and not that the word "secretary" was only a bit of description. It is possible that the use of this word might not have been considered sufficient to exclude his personal liability, without the aid of the statement that he signed for the company, because we find in *Dutton v. Marsh*, L. R. 6 Q. B. 361, decided two years later, the Court of Queen's Bench holding individual directors of a joint stock company personally liable on a note signed by them, in the body of which they were described as directors of the company, thus: "We the directors of the Isle of Man Slate and Flag Company, do promise," &c., but which contained nothing else to show that they acted for the company in signing it. In that case Cockburn, C. J., thus summarized the result of the decisions at p. 364: "The effect of the authorities is clearly this, that where parties in making a promissory note or accepting a bill describe themselves as directors, or by any similar form of description, but do not state on the face of the document that it is on account or on behalf of those whom they might otherwise be considered as representing—if they merely describe themselves as directors, but do not state that they are acting on behalf of the company—they are individually liable. But, on the other hand, if they state they are signing the note or acceptance on account of or on behalf of some company or body of whom they are the directors and the representatives, in that case, as the

case of *Lindus v. Melrose* fully establishes, they do not make themselves liable when they sign their names, but are taken to have been acting for the company, as the statement on the face of the document represented."

These propositions are perhaps stated rather too broadly to be applied without reserve in cases in which the circumstances differ much from those with reference to which they were propounded. Thus, in one respect, the doctrine, as enunciated, might seem at variance with what was decided in the later case of *Okell v. Charles*, 34 L. T. N. S. 822, in which the Court of Appeal held that, for the purpose of excluding the personal responsibility of the official accepting a bill, under the Joint Stock Companies Act, 1856, it is not essential that the character in which he acts shall appear on the face of the document; and in another respect, as applied to a bill of exchange, it rather leaves out of sight the effect which the form of the address may have in indicating the capacity in which the acceptance is signed; but, when read with reference to persons who, like the defendant in *Alexander v. Sizer*, and like the defendant Cox in this case, not only append to their names the designation of the office in which they are acting, but also state in so many words, that they do the act "for the company," it contains an authoritative statement of the grounds on which they incur no personal liability by what they do.

It strikes me that the tendency has of late years been towards greater liberality in construing what appears, either in the body of the document or after the signature of the party, in accordance with what may be called the popular signification of the language and the apparent intention of the person using it, particularly when it imports that he acts or is dealt with not for himself but as agent only. Thus the practice of treating the official designation as descriptive only, and not as expressing the capacity in which the signature is written, which Courts have sometimes in the case of bills of exchange felt bound to adopt, *ut res majis valeat quam pereat*, but which in

most instances misinterpreted the intention of the writer, is somewhat discredited by cases like *Alexander v. Sizer*, and *Gilbert v. McAnnany*. Another example in the same direction is found in the latest case cited to us, viz: *Gadd v. Houghton*, L. R. 1 Ex. D. 357, in which the Court of Appeal virtually overruled the decision of the Court of Exchequer pronounced five years earlier in *Paice v. Walker*, L. R. 5 Ex. 173.

For the reasons I have thus given, I feel myself compelled to the conclusion that the defendant Cox neither intended nor purported to accept in any other than his official and representative capacity; and that by the very form of the acceptance, he and Read, the secretary, conveyed to every business man who dealt with the paper that they accepted only in that way, and disclaimed personal liability.

The contrary opinion was adopted by the majority of the Court below upon reasoning in which I do not concur, but which is distinct and intelligible; viz, that the bill was drawn, not on the company but on the president; that the president was Mr. Cox, and that if the acceptance is not held to be his the bill has not been accepted, but that, as was said in *Herald v. Connah*, 34 L. T. N. S. 885, the effect of his contention is, that in place of accepting he refused to accept.

It is scarcely necessary to say that considerations arise in cases of the class of *Herald v. Connah*, in which the bill has been addressed to the individual by name, either with the addition of his official character, or, as in *Mare v. Charles*, 5 E. & B. 978, and some other cases, without any such addition, which do not necessarily affect one which turns upon an instrument like that before us, in which the official character and not the individual name, is what appears in the address. Where there is the name alone the case is most simple. When to the name the official designation is added, the question arises whether that is to be taken as a mere description of the named individual, or as an intimation that the bill is drawn upon him in his official

and not in his individual capacity, as an agent and not as a principal. But when no individual is named, but as in this case, the address is to "The President of the Company," it strikes me that stronger evidence than the mere existence of that address should be given to lead to the conclusion that the person who happened to be president, and not the company over which he presided, was expected to pay the money. The evidence before us has no such effect. It shows that the money drawn for was a debt due by the company, and it contains nothing to justify the surmise that the drawer thought, or assumed, or expected that any individual would become responsible to him for the company's debt. So far is it from pointing to the defendant Cox as a person who was in the thoughts of the drawer, it does not shew that he knew that Cox was the president; nor is it in terms shown that Cox was in fact the president when the bill was drawn. The fact that it was drawn on him *in his character* of president, is shewn quite as conclusively as the corresponding fact in *Robertson v. Glass* was shown by the admission in the pleadings on which Mr. Justice Gwynne placed so much stress. If, therefore, the result should be that this bill is not accepted at all, because not drawn on the company, that result, while it is one against which the Courts will lean as far as the materials will reasonably permit, is yet one which the Courts in several of the cases cited have pointed out as a result which may have to be submitted to. The plaintiff here could not reasonably complain of it. It would follow from the way he drew the bill, and would not under the circumstances be unjust, as he still would have his remedy against the company for his debt. It would certainly not be so unjust as to hold the defendant personally responsible.

I am of opinion, however, that the bill may, notwithstanding the form of the address, be held to have been drawn upon the company.

It will be in accordance with the modern tendency to look rather at the intent to be gathered from the whole

instrument than at the exact language used in any part of it, to which I have already adverted, to treat this bill as one upon the company and not on the individual who was president; and we have a right, not perhaps as guiding the construction, but as enforcing and confirming a particular view, to look at the surrounding facts. From these the necessary conclusion is, that in holding this bill to have been drawn on the company we do no violence to the intention or understanding of the drawer, and we construe the direction as it was construed by the officers of the company, and as they, by the form of their acceptance, informed the drawer or indorsee they construed it. Cheques upon our incorporated banks are sometimes addressed to the manager or to the cashier. If one of those banks, having funds of a customer, dishonoured his cheque, and was sued in an action for so doing, I should not, as at present advised, be prepared to nonsuit the plaintiff because he had not addressed the cheque directly to the corporation.

We are not, however, without more direct authority. The cases referred to under the English Joint Stock Companies Acts, in which notes were held to be made in the name of the company, although in form in the names of the directors, tend in that direction. But we have a more direct decision in the case of *Gilbert v. McAnnany*, which I have already cited. In that case, Mr. Justice Wilson referred to two cases, viz., *Murray v. East India Co.*, 5 B. & Ald. 204, and *Neale v. Turton*, 4 Bing. 149, as instances in which actions were brought upon bills as drawn upon and accepted by a company, the bills in each case having been addressed to the directors of the company. It does not appear that in those cases the sufficiency of the address was questioned. The same cases are cited in argument in *Bult v. Morrell*, 12 A. & E. 745, counsel on both sides referring to *Murray v. East India Co.*, which was an action against a trading corporation, as deciding that the action was well brought against the company. In *Murray's Case*, the liability of the company to be sued in

assumpsit upon the bills was one of the questions in contest, and the absence of objection on the score of the address being to the directors and not to the company, is, therefore, almost equivalent to a decision, and makes the case an authority for holding that a bill, addressed to an officer of a trading corporation authorized to accept bills, is not necessarily to be treated as drawn on the officer personally.

Neale v. Turton, so far as it is an authority, is in the same direction ; but the case turned, as I understand it, upon the ground that the plaintiff, who sought to make the members of an incorporated company liable on a bill addressed to the directors of the company, was himself a partner in the company, and was, as a consequence of the success of his own contention, disabled from maintaining the action.

In *Bult v. Morrell*, the bill was addressed to the directors of an incorporated company. The action, which was against five directors, three of whom had signed the acceptance, failed by reason of the misjoinder of another person who had also signed the acceptance as manager, and who was not a director, and who was found by the jury not to have accepted the bill. The case does not strike me as aiding to any great extent in the present one.

The same thing may be said of two cases in 9 C. B. pp. 570 and 574, in which instruments had been drawn by officers of an Assurance Company addressed to the cashier, directing him to credit the persons named, in cash, the amounts claimed under policies. In one case, *Ellison v. Collingridge*, 9 C. B. 570, the instrument was held to be a bill of exchange, but whether the bill of Collingridge, the managing director who drew it, or of the company, does not appear from the report. The fact that Collingridge was sued and that the plaintiff recovered against him, looks as if the transaction was treated as his, like that before our own Court of Queen's Bench in *Hagarty v. Squier*, 42 U. C. R. 165 ; but there was also a count upon a policy of the company, which seems to show that he was sued only

as a public officer. In the other case, *Allen v. Sea, Fire, and Life Assurance Co.*, 9 C. B. 574, a similar instrument, drawn by two directors and addressed to the cashier, was held to be the promissory note of the company. The main point decided, in each case, was, that a direction or promise to place cash at a person's credit was equivalent to a direction or promise to pay cash. The cashier does not appear to have accepted in either case.

I do not overlook the importance of uniformity in decisions upon commercial transactions, which the counsel for the plaintiff has reminded us of, citing *Ex parte Baker Re Bellman*, L. R. 4 Chy. D., 795, as a recent exposition of the doctrine. But transactions exhibit so much variety that each must, to a great extent, depend upon its own circumstances. The instrument before us is in a form which is not very often met with. I may say, as Bramwell, B., said in *Herald v. Connah*, 34 L. T. N. S. at p. 886; "I do not think we can find any authority that directly bears on this case. We must look to the instrument itself, and see what the parties intended, as that intention appears on the face of the document." Looking at this document, I should not infer from it either that the drawer had any individual in his mind when he addressed the bill to the president of the company, or supposed that he was doing anything but drawing on the company; or that any commercial man would regard it either as a demand upon any individual or a promise to pay by any individual. The idea that the person who accepted could be charged personally would, unless my impression is much astray, arise not from the reading of the paper by a commercial man, but from reasoning upon the supposed effect of legal decisions, and would be much more likely to occur to a lawyer than to a commercial man. This is, in fact, borne out by the evidence that the notice of protest was sent to the railway company, and not to Mr. Cox.

On the whole, I think we should adopt the conclusion of Mr. Justice Cameron in the Court below, and allow this appeal, with costs.

MORRISON, J.A.—I concur with my brother Patterson, in holding that the defendant is not personally liable on the bill of exchange in question.

OSLER, J.—The Act referred to on the argument, under the authority of which it is said that the bill was accepted, is the 16 Vict. ch. 241. Section 5 enacts, that the company shall have power to become parties to promissory notes and bills of exchange; and any promissory note made or endorsed, and any bill of exchange drawn, accepted, or endorsed by the president of the company, with the counter signature of the secretary of the company, or any two of the directors of the company, and under the authority of a majority of a quorum of the directors, shall be binding upon the company; and every promissory note or bill of exchange made, drawn, accepted, or endorsed by the president of the company, or any two of the directors as such, with the counter signature of the secretary, *shall be presumed to have been properly* made, drawn, accepted, or endorsed, as the case may be, *for the company*, until the contrary be shewn; and in no case shall it be necessary to have the seal of the company affixed to any such bill of exchange or promissory note; nor shall the president or directors, or secretary of the company so making, drawing, accepting, or endorsing, be thereby subjected individually to any liability whatever.

The defendant contends that he is not liable, because the bill has been accepted in the manner prescribed by this section, and the acceptance is, therefore, that of the railway company, and not his individual acceptance.

His liability, however, depends, I think, in the first place, upon whether the company are the drawees of the bill so as to warrant their officers in accepting it in the prescribed manner; and, secondly, assuming that the defendant himself and not the company is the drawee, whether he has so accepted it as to shew a distinct disclaimer of personal liability.

As to the first point, the Act has made no alteration in

the general law merchant applicable to bills of exchange; and there is, in my opinion, no ground for saying that it has authorized the railway company, by merely adopting the prescribed formalities, to accept a bill of which they are not the drawees. It is almost needless to quote cases, for the general rule that no person but the drawee of a bill is bound by the acceptance, or, as Lord Tenterden puts it in *Polhill v. Walter* 3 B. & Ad. 114, 122, "No one can be liable as acceptor but the person to whom the bill is addressed, unless he be acceptor for honour." No such difficulty as the present could arise upon the drawing or endorsement of a bill. If drawn or endorsed as the Act requires, the officers can incur no liability as drawers or endorsers. But the acceptance is a wholly different thing, because it incorporates in it, and must necessarily be made by the person on whom the bill is drawn: per Kelly, C. B. *Okell v. Charles*, 34 L. T. N. S. 822. That person only, in his own name, or in any name he may choose to adopt, can be the acceptor: *Nicholls v. Diamond*, 9 Ex. 154; *Lindus v. Melrose*, 2 H. & N. 293, 3 H. & N. 180; *Penrose v. Martyr*, E. B. & E. 499.

Now, this bill is in terms addressed, not to the railway company, but "To the President Midland Railway, Port-Hope," which is in effect, unless equivalent to addressing it to the company, an address to some individual substantially answering the description. I see no reason to doubt that the drawee of a bill may be designated by description or reference, as effectually as by name, *e. g.*, to the agent of John Doe. The payee may be so designated, and if he is a person capable of being ascertained at the time the bill is accepted, the bill will be a valid instrument: *Yates v. Nash*, 8 C. B. N. S. 581. A bill directed to the president or other officer of a company is directed to a drawee at least as capable of being ascertained as a bill addressed to no one in particular, but made payable at a particular place and accepted by the person residing there, which is a valid acceptance: *Gray v. Milner*, 8 Taunt. 739; and if such president or officer chooses to accept a bill so drawn, with-

out in plain terms repudiating personal liability, is he not, on the principle of that case as explained in *Peto v. Reynolds*, 9 Ex. 410, to be estopped from saying that he was not the drawee? The bill is, on its face, directed to some one, and an individual who admits that the description applies to him has accepted it. There is a drawee, and an acceptance by that drawee. I conclude, therefore, as to this point, that a bill, though addressed to an official of a company, by his official designation only, may be accepted by him so as to render himself personally liable thereon, just as if it had been drawn upon him by name.

But it is said that the bill, being addressed to the president, is in effect addressed to the company. If that be so there is an end of the case, for the acceptance is then in form sufficient to bind the company. *Murray v. The East India Co.*, 5 B. & Ald. 204, and *Neale v. Turton*, 4 Bing. 149, were cited in support of this contention. In the former case the bill was directed "To the Honourable Court of Directors for affairs of the Honourable United Company of Merchants trading to the East Indies, in London," and was accepted by the secretary by order of the Court. No question was raised as to whether the bill was sufficiently addressed to the company. On the contrary, it was expressly admitted that it was drawn by order of the governor in council, at Madras, in the usual form in which bills of exchange were drawn upon the company at home from the different Presidencies, and that bills so drawn on the company were always accepted in that form by the secretary by order of the Court, and being so accepted were paid by the company. The point decided was, that the corporation, and not the individual members of the body corporate, were liable to be sued in *assumpsit*. In *Neale v. Turton*, 4 Bing. 149, the bill was drawn on the directors of an incorporated company by one of the shareholders. It was accepted, per proprietors of the company—Isaac Buxton. The action was brought against the directors. It was held, (1) that Buxton had no authority to accept the particular bill in question; and, (2) that the bill having been drawn

upon the directors, who were the agents of the company, and accepted as such, was in effect drawn upon the company—that is to say, the partnership of which the plaintiff was himself a member—and that he could not be both drawer and acceptor.

There is also the case of *Gilbert v. McAnnany*, 28 U. C. R. 384. There the bill sued on was directed “To James Glass, secretary Richardson Gold Mining Company;” and across the face of it was written “Accepted—The Richardson Gold Mining Company, per J. Glass.” The action was against the trustees of the company, (a joint stock company formed under 22 Vict. ch. 22,) to recover from them personally the amount of the bill, on the ground that the particulars required by the 57th section of the Act had been omitted from the bill. It was held that the defendants were not liable, the company having no power to accept, draw, or endorse bills as incident to their business; and also, on the authority of *Murray v. East India Co.*, and *Neale v. Turton*, that the bill being directed to Glass, as secretary of the company, authorized him to accept it, as he did, in the name of the company, if he had the authority of the company so to act for them.

In the subsequent case of *Robertson v. Glass*, 20 C. P. 250—an action on the same bill, in which it was attempted to hold the defendant liable upon the acceptance—the Court, while holding that he had not accepted it in such a manner as to make himself personally liable, the acceptance being in the company’s name, declined to express any opinion as to the sufficiency of the address of the bill as being upon the company as the drawee. It will be observed that in neither of the cases referred to was it necessary to decide the point as to the sufficiency of the address of the bill.

In the case of *Bult v. Morrell*, 12 A. & E. 745, the bill was addressed to the Directors of the Imperial Salt and Alkali Company, a joint stock company, the affairs of which were managed by six directors, and the acceptance was “accepted for the Imperial, &c. Company,” signed by

three of the directors, as such, and the manager. The latter was a shareholder in the company. The action was against the directors and manager; the declaration alleging that the bill was accepted by the defendants. The plaintiff was nonsuited. Lord Denman, C. J., at p. 751, said: "I think it could not have been said that a bill drawn upon the directors and accepted by three of them, was accepted also by Parker, who is named as the manager. * * It has been argued that the bill was drawn upon the company, and that when the directors accepted, every shareholder, and therefore the defendant Parker, might be said to accept also, and that he consequently might be joined in the action. * * But this was not a bill drawn upon the company. That fact, if it had existed, might have let in evidence that the directors had power to bind the other shareholders; but here the bill is *drawn upon the directors and accepted by three of them* individually, the name of another party, not a director, being added."

In *Okell v. Charles*, 34 L. T. N. S. 822, and *Herald v. Connah, Ib.*, 885, stress is laid upon the fact that the draft was expressly directed in the one case to the company, and in the other to the person described as agent. In the latter case, Bramwell, L. J., says at p. 886: "If it had been intended that the bill should be addressed to the company, it should have been so addressed in plain words."

If the case of *Neale v. Turton*, 4 Bing. 149, is to be taken as deciding that a bill addressed to an agent is in effect addressed to the principal, it appears to me not to be in accordance with the later case of *Bult v. Morrell*, 12 A. & E. 745, nor with the case of *Nicholls v. Diamond*, 9 Ex. 154, nor with the general rule of law already referred to; and neither that case nor *Murray v. The East India Co.*, are cited in any of the standard text books as authority for the proposition that a bill addressed to an agent or to the officer of a company, is in effect addressed to the principal or the company.

In *Byles on Bills*, 13th ed., p. 38, referring to the general rule that on simple contracts parol evidence is admis-

sible to charge an unnamed principal, though not to discharge an agent who signed as if he was principal, in his own name, it is said : " Yet it is conceived that the law as to negotiable instruments is different, and that where the principal's name does not appear, he is not liable on the bill or note as a party to the instrument."

As to this, see also *Laing v. Taylor*, 26 C. P. 416, and the observations of Morrison, J. A., in *Cross v. Currie*, 5 App. R. at p. 57. If, however, the railway company could accept a bill drawn upon their president or any other officer or person, it would, I think, be necessary in that case for the defendant to shew affirmatively that he and the secretary had authority to accept it for them, and this he has not done. When the bill is drawn *upon the company* and accepted as the Act directs, such authority must be presumed until the contrary be shewn; but I take it that it would be otherwise when the bill is not so drawn: *Gilbert v. McAnnany*, 28 U. C. R. 384, and the *Bank of Montreal v. Smart*, 10 C. P., per Draper, C. J., at p. 19.

I am unable to come to any other conclusion than that the bill in question was addressed, not to the railway company, but to the president, who might accept it in such a way as to make himself personally liable thereon.

This brings me to the other question already stated, viz., whether the defendant has so accepted it.

The action is not brought by one of the original parties to the bill, but by an endorsee, between whom and the defendant or the company, there is no privity.

In *Dutton v. Marsh*, L. R. Q. 6 B. 361, the fact that the company's seal was affixed to the promissory note there sued on was held insufficient to shew that the note was signed on behalf of the company, so as to relieve the directors who signed it from personal liability; and I do not see that greater weight can be given here to the signature of the secretary.

The decisions in such cases as *Southwell v. Bowditch*, L. R. 1 C. P. 100; In App. *Ib.* 374; *Paice v. Walker*, L. R. 5 Ex. 173, and *Gadd v. Houghton*, L. R.

1 Ex. D. 357, which deal with the question whether an agent has so signed a contract as to make himself personally liable, can hardly be treated as having much application to an action against the acceptor of a bill, owing to the peculiar nature of the acceptor's contract; and for the same reason the decisions in cases upon promissory notes, are not, as has been more than once pointed out, of much assistance: *Alexander v. Sizer*, L. R. 4, Ex. 102; *Lyman v. Lovekin*, 20 C. P. 363.

Had the bill been addressed to Geo. A. Cox, president, &c., it is abundantly clear upon authority that he would have been personally bound upon an acceptance in the form of that in the present case: *Mare v. Charles*, 5 E. & B. 978, where the acceptance was "Accepted for the company;" *Herald v. Connah*, 34 L. T. N. S. 822, where the language was "Accepted on behalf of the company." For, having chosen to accept a bill so drawn, he must be taken, where there is any ambiguity in the language he employs, to have accepted in such a manner as to make himself personally liable, rather than so as to make his acceptance of no effect at all. An acceptance "for the company," or "on behalf of the company," may mean, as is pointed out in the cases referred to, and in the case of *The Bank of Montreal v. DeLatre*, 5 U. C. R. 362, an acceptance on account of the company in reliance on an engagement from them that they would keep him in funds to meet the bill.

I desire to express my conclusion upon the whole case in the language of Hagarty, C. J., in *Laing v. Taylor*, 26 C. P. at page 433: "If the plaintiffs assumed anything, it was that the acceptance, signed by the defendant, bound the company. The law says it binds him personally. As against the plaintiffs taking it in good faith for value, it is hard to see what there is in conscience or equity to prevent them saying, as they do now: 'As it seems you did not bind the company, you cannot be heard urging now that it does not bind yourself, as the law declares it does, because I thought you had properly bound your principals.'"

I think the appeal should be dismissed.

Appeal dismissed.

CAMPBELL V. MCDOUGALL ET AL.

Mortgage—Agreement to postpone—Non-disclosure of.

The plaintiff, being about to advance money to W. M. on property on which J. M. had a mortgage, J. M. executed an agreement that the proposed mortgage to plaintiff should have priority over his. Ten years afterwards J. M. assigned his mortgage to the Quebec Bank, to secure acceptances on which he was liable, which assignment was registered, and superseded the agreement, which had never been registered, and the existence of which J. M. had not mentioned to the bank. The plaintiff filed a bill against the executors of W. M., the Quebec Bank, and J. M., asking for a sale of the land; payment of any deficiency by the executors, and that J. M. might be ordered to make good any loss by reason of the assignment of his mortgage.

Held, reversing the decree of SPRAGGE, C., 26 Gr. 280, that the plaintiff was entitled to a decree against J. M. for payment of the mortgage money, in the meantime retaining his position as a subsequent incumbrancer; but, BLAKE, V.C., dissenting, that the Court could not, at the instance of a subsequent incumbrancer who did not ask to redeem, order a sale of the property in opposition to the wishes of the bank.

Held, also, BLAKE, V.C., dissenting, that under the circumstances, neither the plaintiff nor J. M. were entitled to costs, either in this Court or the Court below.

Per BLAKE, V.C.—That the litigation was caused by J. M., and the costs should be borne by him.

THIS was an appeal from the decree of Spragge, C., dismissing the plaintiff's bill, with costs, reported 26 Gr. 280.

The bill was filed against the executors of William McDougall, the Quebec Bank, and James McDougall.

It prayed that the plaintiff might be paid the amount due on a mortgage made by William McDougall to the plaintiff, and that in default the mortgaged premises might be sold under the directions of the Court; (2) That the executors might also be ordered to pay the balance of the mortgage debt and costs, after deducting the amount realized by the sale. (3) That the plaintiff might have immediate possession of the lands mortgaged: (4) That the proceeds of the sale might be applied to satisfy the mortgages upon the land, (viz.: the mortgage to the plaintiff, and a mortgage to James McDougall assigned by him to the Quebec Bank) according to their priority. And that James McDougall might be ordered to make good all loss and damage sustained by the plaintiff,

by reason of his transferring his mortgage to the Bank, and receiving value therefor as a security prior to the plaintiff's mortgage upon the land.

It appeared that William McDougall had made three mortgages on the same land.

The first was to a Mr. Carpenter. It was not involved in the present litigation, and was only mentioned in connection with a dispute, whether, when James McDougall told the Quebec Bank, on the occasion of his assigning his mortgage to the Bank, that there were \$5000 ahead of him upon the property, he alluded to the Carpenter mortgage, or to that to the plaintiff.

The second mortgage was to one Taylor, and was for \$4,000.

The third was to James McDougall for \$20,000.

In February, 1866, Taylor was pressing for payment, and William McDougall applied to the plaintiff for a loan of money to pay off Taylor. The plaintiff was willing to lend the money upon a mortgage, which should take the place of Taylor's in order of priority. Thereupon, James McDougall executed an agreement that the proposed mortgage to the plaintiff should have priority over that to him. The date of this document was 7th February, 1866.

The mortgage was accordingly made to the plaintiff, the money advanced, and Taylor's mortgage paid off and discharged.

The plaintiff omitted to register the agreement, and so matters remained for upwards of ten years.

In March, 1876, James McDougall being liable to the Quebec Bank upon acceptances, to the amount of \$20,000, assigned to the Bank by way of security his mortgage from William McDougall; and that assignment being promptly registered superseded the agreement of February, 1866, and deprived the plaintiff of his priority over the \$20,000 mortgage.

The case was argued on the 27th January, 1880 (a).

(a) *Present*—MOSS, C. J. A., BURTON, PATTERSON, and MORRISON, JJ. A.

Blake, Q. C., and Walter Cassels, for the appellant. Whatever the decision of the Court may be in reference to the sale of the mortgaged premises asked for by the bill, the appellant is clearly entitled to relief against *James McDougall*. By virtue of the absolute assignment of his mortgage to the Bank, which he made in defiance of his agreement, as collateral security for his liability upon his acceptances, he succeeded in giving his mortgage priority over the appellants, and has thus profited to the extent to which the latter has lost. Under these circumstances we submit that he should be ordered to reimburse the appellant. It was hoped that, notwithstanding the improper form of the assignment, McDougall might have given such notice to the Bank of the existence of the agreement as would have preserved the appellant's rights, and the bill was originally framed on this hypothesis. The Bank, however, by its answer denied notice, and McDougall, by his answer, so far from setting up that he had given any notice which would in anywise affect the position of the Bank or the appellant, alleged that he received no consideration for the agreement in question, and declared that when he made the assignment to the Bank he had not in his mind that instrument, and if he had it would probably not have occurred to him to make any mention thereof to the Bank, and submitted that the prejudice to the appellant was due to his own neglect in not registering the document. The appellant being unable to obtain evidence of notice to the Bank, and giving credence to McDougall's answer, was obliged to admit its position, and to amend acknowledging the priority of the Bank, and making a case against McDougall for consequential relief. In his evidence however taken at the hearing upon the amended record, McDougall attempted to establish that he had given some notice to the Bank of the existence of some prior encumbrances. It is submitted that the evidence is inadequate to establish that McDougall gave the Bank notice of the appellant's mortgage, and the learned Chancellor was wrong in holding that notice thereof had been given. His lordship

overlooked the Carpenter mortgage, which was the mortgage that McDougall must have referred to in his negotiations with the Bank. Under the circumstances it is utterly impossible to assume that it was the mortgage in question; but we contend further that, in view of what took place, it was not competent for McDougall to set up that he had given such notice; and that no effect should on this ground be given to the evidence. If it were thought right to allow him to set up the giving of notice, the interests of justice require that the appellant should, as he asked, have leave to re-amend the bill, making again a case of notice against the Bank, else James McDougall, after by his pleading and conduct leading the appellant to forego a remedy against the Bank, and so escaping from the liability which in that event would have arisen under his covenant to the Bank, would be permitted by his change of base to escape from the liability to the appellant created by his neglect to notify the Bank. In any event the appellant is entitled to the ordinary decree for sale, and to prove against the estate of William McDougall for any deficiency.

MacLennan, Q.C., for the respondent James McDougall.

The appellant's case against the respondent has been put on the ground of actual fraud on his part, but the Bill contains no such charge. It is there alleged that the assignment to the Bank was registered without notice of the agreement to give priority to the appellant's mortgage, and that as between the Bank and the appellant the mortgage now held by the bank is prior to his mortgage, and the respondent is charged with having "concealed from the Bank the fact of the agreement." The respondent swore in his answer that when he made the assignment to the Bank, he had not in his mind the instrument referred to: that he did not think whether it was registered or not, nor whether registration would or would not make any difference; and he denied that in assigning his mortgage to the Bank he intended to defraud the appellant. No evidence of what took place on the assignment to the Bank was offered by the appellant, except that of the respondent as a

witness at the hearing ; and the Chancellor held that the respondent gave "honest evidence, though his memory on some points may have been at fault." He swore, on such examination by the appellant, in effect, that though he had not in his mind, and therefore did not mention, the paper in question, he told the Bank manager at Montreal, and perhaps the principal officer at Quebec, before assigning, that there was a prior mortgage, or prior mortgages, on the property to the amount of five or six thousand dollars. The only evidence offered by the appellant thus distinctly negatives any intention of fraudulent concealment on the part of this respondent ; and the sole ground on which at the hearing the appellant demanded relief thus failed. This respondent had in his answer neither admitted nor denied that the Bank had notice, and whether the facts amount to such notice is a matter of law. The appellant, however, chose to accept the Bank's denial of notice, and shaped the pleadings accordingly. If the respondent's not giving such notice as would subject the Bank to the agreement referred to has the effect contended for by the appellant, it is submitted that he has not proved, by an examination of those who represented the Bank or otherwise, that the Bank had no such notice, and the evidence of the respondent shews the contrary sufficiently for his exoneration. If the appellant would be entitled to relief notwithstanding the absence of fraud, in case by the appellant's own neglect the respondent had been benefited to the extent of the appellant's mortgage, he has failed to prove such benefit to have been received by the respondent. The Bank has gained priority by virtue of the Registry Act, from the omission to register the agreement in question, and so by virtue of the Statute that instrument became fraudulent and void. Equity does not relieve against the operation of the Registry Law, except on the ground of fraud on the part of those against whom the relief is to be given. The defendant had a right to assign the mortgage, and the Bank to register the assignment. If the appellant did not choose to

register the instrument under which he now claims, and to thus give notice of it to all the world, he cannot claim to be relieved from the consequences of his own ten years' negligence in giving such notice, by now insisting that it was the duty of the respondent to keep the matter in his mind for all that long period for the appellant's benefit, and in assigning to assume, without having been informed, that the appellant had acted on the paper, but had not registered it; and to have given notice of these facts to the Bank before assigning his own mortgage. The respondent got no advantage from the Bank not being informed of the appellant's mortgage having priority; for he had informed the Bank, as has been stated, that there was a prior mortgage, or prior mortgages, to a larger amount, the fact being, as the appellant now assumes, that the appellant's mortgage for \$4,000 was the only mortgage having, or entitled to have, priority over the respondent's. The decisions under the Statute 27th Elizabeth, ch. 4, apply in principle, and are to the effect that a voluntary grantee has no remedy or redress either against a subsequent purchaser, or against the grantor and vendor, or even against the unpaid purchase money, though on the subsequent transaction all parties had notice of the voluntary settlement, and no matter what covenants the voluntary settlement may contain. The principle of these decisions is, that to give active relief on the first instrument, which the statute had declared void, would be to impair the effect of the Statute; and the same reasoning applies to the Registry Acts. In any event, the appellant not having offered to redeem the Bank, and having chosen so to construct his bill that he can get no other relief against the Bank, and having in fact asked at the bar or otherwise no such relief, and it not appearing that the persons entitled to the equity of redemption were before the Court, he was not in a situation to get relief against the respondent in this case. Under the circumstances leave to amend could not properly have been granted by the Court below, even if it had been

asked at the hearing. Not having asked it there, he is not entitled to make such an application for the first time in the Court of Appeal, and to have the judgment below reversed here for not having granted what the Court appealed from had not been asked to grant. He cited *Daking v. Whimper*, 26 Beav. 568; *Kerr on Frauds*, 169, 170; *Slim v. Croucher*, 2 Giff. 37.

E. Douglas Armour, for the respondent, the Quebec Bank.

The bill was properly dismissed as against the Quebec Bank, as the learned Chancellor found upon the evidence that the bank were innocent holders for value of the mortgage, and had no notice or knowledge of the agreement to postpone the mortgage to that of the appellant, and his Lordship's finding upon the evidence should not be disturbed. The prior registration of the assignment without notice before registration has the effect, under the Registry Laws, of making the agreement to postpone fraudulent and void as against the Bank. If the appellant seeks merely the ordinary sale decree and personal order against the estate of the mortgagor, William McDougall, the Bank is unnecessarily and improperly made a party hereto. On the present state of the record the appellant should only obtain such relief as he asks upon the terms of redeeming the Bank, or it should be granted subject to their mortgage, and without prejudicing their security or position, and in any case the appellant should pay the Bank's costs. The relief now sought by re-amendment, if granted, would in effect be the granting of a new hearing between the parties upon the original bill, on the ground that the appellant is by the discovery of evidence now in a position to prove his case; but the evidence does not establish any grounds for this, for it is not stated or shewn that the appellant's mortgage was one of the alleged prior incumbrances of which James McDougall is said to have notified the Bank; and further the appellant impeaches the evidence of James McDougall, on whom he must rely solely as far as shown to prove, notice to the Bank. In case an order should be made for payment of the appellant's mortgage by either James

McDougall or the executors of William McDougall, it should be declared that the position which the Bank held prior to this suit is not thereby affected. He cited *Briggs v. Jones*, L. R. 10 Eq. 92; G. O. 439, 440.

N. W. Hoyles, for the respondents, the executors of William McDougall, submitted that the appellant was not entitled to any personal order against the estate, and that the executors should be paid their costs.

September 7, 1880. PATTERSON, J. A.—It is contended that it was the duty of James McDougall to have informed the bank that ten years ago he had executed the agreement in question; and although no such general proposition is insisted on as that in every case a person conveying land, without giving express notice of a charge created by him, is bound to indemnify the negligent incumbrancer who has omitted to register his deed, it is argued that inasmuch as the increased value of the security inures to the benefit of the debtor, whose debt is paid by means of it, the debtor, James McDougall, cannot be allowed to profit contrary to the terms of his agreement, and ought therefore to make good the plaintiff's loss.

It is said that the land has proved insufficient security, not being worth enough to pay the \$20,000 and also the amount of the plaintiff's mortgage; and I observe the opinion, given in evidence by a witness, that the land is not at its present value worth over \$12,500, and no one places a higher estimate upon it.

We have not been referred to any authority which seems of much assistance. The case of *Slim v. Croucher*, 2 Giff. 37, 1 DeG. F. & J. 518, proceeded upon principles inapplicable to the facts in this case. The plaintiff there had been induced to lend his money to one Hudson, upon a misrepresentation made to himself by Croucher, to the effect that a lease, which he was giving to Hudson, was one which he had power to give; when the fact was, that he had already given a lease to Hudson, who had registered it and assigned it to an innocent purchaser.

It was in effect an action for deceit, and the judgments in appeal are principally occupied with the assertion of the concurrent jurisdiction of equity to entertain actions of the kind.

In this case there was no deceit practised upon the plaintiff, whose remedy must, therefore, (if he has a remedy against James McDougall,) rest on other principles.

Mr. Maclellan cited the case of *Daking v. Whimper*, 26 Beav. 568, as in favour of the defendant. That case decided that a person who made a voluntary settlement, and afterwards defeated the settlement by a conveyance for value, was not liable to indemnify the volunteer. To give application to that case, however, it would be necessary to treat the plaintiff as a volunteer. I do not see how that can reasonably be asked, when the fact is apparent that he advanced his money, not on the strength of William McDougall's mortgage alone, for that would have been to submit to be postponed to James McDougall, but on the faith of the agreement which gave priority to his mortgage, and which was executed for the very purpose of facilitating the loan by giving it priority.

The plaintiff seems to me to demand nothing against James McDougall but what is just and reasonable. I think he is right in treating the agreement as made with him. By that document, James McDougall assures the plaintiff that he will not resort to the land for payment of his \$20,000, until the plaintiff's loan and interest have been repaid to him.

If James McDougall had himself proceeded to sell the land, and had obtained \$20,000, or any less sum for it, and if we assume, as we have to do, that he and the plaintiff were similarly situated in having no other fund to resort to for payment, the plaintiff would surely have been entitled to payment of his loan and interest out of the money.

Whether McDougall intended to use his money in paying his debts, or to keep it, the plaintiff would have had a right to insist that he should only use or keep his own

share after paying the plaintiff off; and if he had paid away the whole, the plaintiff would clearly have been entitled to call on him to replace it to the extent of his demand.

It is the same thing, whether McDougall sold the land and paid all the money to his creditor, or empowered the creditor to sell the land and keep all the money. This is what has happened. The creditor has the land, and has power to sell it, and keep all the money to the extent of \$20,000, or whatever McDougall's debt may amount to.

The plaintiff, who in relation to the Bank is a subsequent incumbrancer, asks to have the land sold; and further asks that he may be placed, (as to James McDougall), in the same position as if James had himself sold the land; that is, with the right to be paid by James his debt and interest before the money is appropriated to the payment of James's debts.

This appears only just and right, so far as James McDougall is concerned.

The plaintiff makes the Bank a party, or rather retains the Bank as a party to the bill in its amended form, not because he offers to redeem, for he makes no such offer, but because he alleges that the loss which he asserts he will suffer cannot be ascertained without a sale of the land.

There does not appear to be any reasonable ground for forcing the Bank to sell. The state of the market may make it undesirable to do so at the particular time, and indeed we cannot, for any reason now presented to us, deprive the Bank, at the instance of a subsequent incumbrancer who does not ask to redeem, of the right to retain unsold, if it pleases, and as long as it pleases, the land of which it has the absolute legal estate.

There does not, however, seem to be any imperative necessity for at present estimating the deficiency likely to result after the land comes to be sold. The idea conveyed by the evidence is that no part of the plaintiff's claim will be covered, unless McDougall's debt to the Bank has been considerably reduced. If things turn out better than

appearances now promise, McDougall will be to that extent the gainer. If the present anticipations are realized, he ought to pay the plaintiff his \$4000 and interest.

The just way to dispose of the matter would appear, therefore, to be, to give the plaintiff a decree against McDougall for the payment of that money, leaving McDougall, when he has paid off the plaintiff, to pursue whatever remedy may be available as between him and the Bank for whatever surplus the land may yield, the plaintiff in the mean time retaining his position of subsequent incumbrancer; and not interfering with the plaintiff's right to rank upon the estate of William McDougall in the administration of that estate, or with the right of James so to rank when he pays the plaintiff off.

This appeal, so far as it affects the Quebec Bank and the executors of William McDougall, should be dismissed, with costs. As to James McDougall, the appeal should be allowed, and the plaintiff should have a decree for the payment of the mortgage money and interest, the amount of which can be computed by the registrar. It does not seem right, however, that the plaintiff should have costs against him. The relief we grant is not in the form asked in the bill. The plaintiff recovers in effect upon the contract between him and James. He could not reasonably have asked, in any circumstances, for more than the costs of an ordinary action at law upon a contract. Here there is no formal contract by McDougall to do anything. When he signed the paper, he had done all that he was to do. The mischief to the plaintiff arose from his own neglect to register the instrument, and that neglect has been the occasion of the litigation. There will, therefore, as between the plaintiff and James be no costs to either party, either here or in the Court below, up to the issuing of the decree now directed.

Moss, C.J.A.—We are all agreed upon the substantial merits of this case, but some difference of opinion exists as to the details of the proper judgment to be delivered.

It has been assumed that the learned Chancellor held that the plaintiff had failed to establish the allegation that the defendant James McDougall had concealed from the Bank the existence of his agreement that the mortgage he was assigning should be postponed to the plaintiff's security. The learned Vice-Chancellor, of whose assistance we have had the benefit upon the hearing of this appeal, does not concur in that conclusion. I confess that, while I keep fully in view the advantage which the Chancellor enjoyed in hearing the defendant deliver his evidence, and the favourable opinion which his lordship formed of his veracity, I share the opinion that notice by the defendant to the Bank of the advancement in priority of the plaintiff's mortgage has not been established. I cannot conceive any satisfactory answer to the argument which the Vice-Chancellor has founded upon the issue on this question, which alone is raised by the pleading. It seems difficult to suggest a more distinct admission of a failure to make any communication on the subject. Indeed the whole scope of the answer seems to be confined to the denial of a *wilful* or *fraudulent* suppression of the truth. A careful examination of the Chancellor's judgment induces me to think that this was the point to which his attention was more immediately directed. But an adjudication upon this topic is, in the view we take of the basis of the plaintiff's right to relief, only relevant to the question of costs; and I do not think that for this purpose it is incumbent upon us to measure nicely the degrees of negligence attributable to the respective parties—to the plaintiff in neglecting to take the usual and obvious precaution of registering the document, or to the defendant in failing, some ten years afterwards, to mention its existence to the Bank. Putting the case on the highest ground for the plaintiff (apart from that of actual fraud,) there was negligence on both sides; and I think that most persons would be inclined to designate that of the plaintiff as more gross and inexcusable than that of James McDougall.

In view of these and the other considerations presented

by my brother Patterson, I think it more in accordance with equity to refuse than to allow the plaintiff his costs.

I am also unable to adopt the view that the Court ought to direct a sale of the mortgaged premises, in opposition to the Bank's wishes. The plaintiff has deliberately accepted the position of a subsequent incumbrancer. He neither offers nor desires to redeem the Bank. According to the evidence he has adduced, there is but little probability of the property realizing enough, if now sold, to satisfy the Bank's whole claim. I cannot think that the Court has any authority to compel an immediate sale, in the face of the Bank's objection. If such a discretionary jurisdiction existed, I venture to think that this would not be a proper case for its exercise, where there is so much reason for supposing that the time is inopportune for placing such a property on the market. It is true that a subsequent encumbrancer, who is brought into Court by a prior one, has a right to obtain a sale upon proper terms; but that is a very different case from that of a subsequent incumbrancer making a prior one a party to a suit. In the latter case we would not, I think, be justified in relaxing the rule which limits his right to redemption of the earlier security.

In my opinion, therefore, the decree proposed by my brother Patterson is that which is conformable to the doctrine of the Court of Chancery, and which ought now to be pronounced by this Court.

BLAKE, V.C.—The plaintiff, being about to advance money on property on which the defendant, James McDougall, had a prior mortgage, there was procured an instrument, on the faith of which \$4000 was advanced, which is in the following words: "Know all men by these presents, that I, James McDougall, of the city of Montreal, miller, hereby declare and agree that a certain mortgage now being made by my brother William McDougall, of Baltimore, in the county of Northumberland, miller, unto and in favour of David Campbell, Esquire, upon his milling and other property near Baltimore, as described in a mort-

gage prior to mine, in favour of Dr. Taylor, which is registered, for securing to said David Campbell four thousand dollars, with interest, shall stand as first charge upon the property so described, and that my mortgage which I now hold on the same property shall be postponed thereto, and shall rank thereafter, notwithstanding priority of date and registration."

Subsequently to this agreement James McDougall assigned his mortgage to the defendants, the Quebec Bank, and covenanted that "he, the said assignor, hath not at any time heretofore made, done, or executed, or knowingly suffered any act, deed, matter, or thing whatsoever, by means whereof the said lands and premises hereby granted or intended so to be, or any part thereof, are or is charged, encumbered, or in anywise affected in title, estate, or otherwise howsoever."

As a matter of fact at this time the title had been affected by the act of the assignor in postponing this \$20,000 mortgage to the \$4,000 mortgage of the plaintiff. In his examination the defendant James McDougall says: "Q. What did you mean by this telegram? A. That was after I got the information, for I did not know it when I made that assignment that Campbell's was in existence." Indeed his statement in his answer would have precluded him from giving evidence of notice to the bank of knowledge of the agreement as to the plaintiff's mortgage, for in par. 5 he says: "I never heard or knew, to the best of my knowledge, recollection, or belief, until lately whether the said mortgage transaction between my brother and the plaintiff had ever been carried into effect, and I never thought of the matter particularly afterwards." And in par. 6: "When I made the said assignment I had not in my mind the instrument signed by me as aforesaid, nor, if I had, would it probably have occurred to me as necessary to make any mention thereof to the Bank. I did not think whether it was registered or not, nor whether registration would or would not make any difference." The pleading does not raise, but negatives notice on the part of the

defendant James McDougall to the bank ; and the evidence of this defendant does not prove it, nor is it otherwise established in the case. By the agreement of James McDougall he was not at liberty to claim priority for his mortgage over that of the plaintiff. This he has done, and I see no reason why, to the extent of any damage that may have arisen to the plaintiff by this act, James McDougall should not make good such loss to the plaintiff. I do not see on what principle we can absolve James McDougall from this result, although the assignee may have registered the transfer of the mortgage, and thus precluded the plaintiff from obtaining relief against the Quebec Bank. I think, also, that as James McDougall made the representation he did to the Bank, and has raised a question on which he has failed, and is now seeking to avoid an agreement distinctly proved against him, and is seeking to place himself in a position he covenanted he should not occupy, that he should pay the costs of this litigation. I think if the defendant James McDougall chooses he is entitled to have an account taken of the amount due to the Quebec Bank on their mortgage, and to a sale of the property, subject to the amount due on this mortgage ; and the plaintiff is entitled to an order against James McDougall for any deficiency that may be then due on his mortgage, after appropriating the purchase money. The Quebec Bank may as well be retained as parties to bind them by the account to be taken, and their costs must also be paid by James McDougall. As the litigation is caused by the act of James McDougall, I think the costs should follow the result, and be borne by the party that has caused it.

MORRISON, J. A., concurred with MOSS, C.J.A.

Appeal allowed.

McMULLEN V. WILLIAMS.

Warranty on sale of piano—Parol evidence of authority of salesman to warrant—Damages.

The plaintiff sued the defendant, a piano maker, for breach of a warranty given by his salesman on the sale of a piano, that the instrument was then sound and in good order. The plaintiff signed the ordinary receipt note, which is set out below, providing for payment of the price, and that until paid the property should remain in defendant, in which there was no mention of the warranty.

Held, that parol evidence of the warranty was admissible, as it was apparent that the receipt note was not intended to be the evidence of the whole contract.

Quære, whether this question should not have been left to the jury.

Held, also, that the salesman had authority to give the warranty.

Quære, whether any evidence of an express warranty was necessary.

Held, also, that the proper measure of damages to allow was the price which at the time of sale would have been required to remove the alleged defect, and the jury having given much more, the Court named a sum to which the plaintiff might reduce his verdict, or that there should be a new trial.

APPEAL from the County Court of the County of York,

This was an action for breach of warranty upon the sale of a piano, that the instrument was sound and in good order. The defendant was a piano maker, and the plaintiff purchased the piano in question from a salesman in the defendant's shop, who, it was alleged, warranted the instrument to be sound and in good order. The price agreed upon was \$300, which was to be paid in monthly instalments of \$10 each, extending over thirty-six months to provide for interest. The date of the transaction was the 21st December, 1874, and a receipt note in the following form was signed by the plaintiff:

"Rented and received on hire from R. S. Williams, one pianoforte, No. 22,684, value three hundred dollars; which sum I agree to pay to the said R. S. Williams or order, in the event of the said instrument being destroyed or injured in any way. I also agree to pay the sum of ten dollars per month rent for the use of said instrument; the first payment of said rent to become due this day, and monthly in advance afterwards until returned, or this agreement

cancelled. And it is hereby agreed, that after the due payment by me of the said rent upon the twenty-first day of each successive month for the term of thirty-six months, independently of the "cash bonus," the said instrument shall become my property, free of all claims, and this contract cancelled; and that during the said term of thirty-six months the said instrument shall be used only at my own residence, at 106 Grosvenor Avenue, City; and in the event of any change of residence, immediate notice of such change shall be given to the said R. S. Williams. I further agree that upon the non-payment by me at any time of the said rent on the day or days above mentioned, the said R. S. Williams, or his agent, shall have full liberty to remove the said instrument from my residence to his ware-rooms, in Toronto, and I agree to pay all freight or other expenses (including legal charges, if incurred) contingent on such removal. And it is distinctly understood by me, that nothing in this contract shall be construed to entitle me to the ownership of the said piano until full payment be made and this contract cancelled."

At the trial the plaintiff swore that when he was asked to sign this receipt, he objected to the words, "rented and received," as it altered the agreement between them; but that he signed it upon being told that it was a matter of form, so that in case of his death or failure to fulfil the contract, the defendant could recover the piano.

It was objected by the defendant that the contract having been reduced to writing, parol evidence could not be given to prove a warranty. The learned Judge ruled that the evidence was admissible, and the jury gave the plaintiff a verdict for \$125.

A rule *nisi* to set aside the verdict, and enter a nonsuit or verdict for defendant, was discharged.

The defendant appealed.

The case was argued on the 13th September, 1880.

Rose for the appellant. It is submitted that the document signed by the respondent, which contained additional

terms to those mentioned in the conversation, must be considered to be the true agreement arrived at by the parties ; and as the warranty mentioned during the conversation was not reduced to writing, no recovery can be had thereon : *Powell v. Edmunds*, 12 East 6 ; *Bennett v. Tregent*, 24 C. P. 565 ; *Henderson v. Cotter*, 15 U. C. R. 345 ; *Benjamin* on Sales, 2nd ed., 496. At all events it should have been left to the jury to say whether the paper writing truly represented the contract. It was not shewn that the clerk who made the representation was the appellant's general agent for sale, or had authority to give a warranty. But if there was a warranty, no breach was proved, as it was not shewn that the piano was not sound and in good order at the time of the sale. The weight of evidence was clearly with the appellant. If, however there was a warranty and a breach, the damages are excessive. It was sworn that the defect could have been removed for \$15, which was the largest measure of damages to which the respondent was entitled : *Mayne* on Damages, 2nd ed., pp. 72, 3 ; and the Judge should have so told the jury. *Knight v. Egerton*, 7 Ex. 407, is a direct authority to shew that a Judge is bound to tell the jury the correct measure of damages.

Delamere, for the respondent. The cases cited by the appellant to shew that parol evidence of the warranty was not admissible do not apply here, as it is apparent from what took place when the piano was purchased, that it was never intended that the whole contract should be reduced into writing. The receipt note was only signed for a special purpose—to protect the appellant in case of the purchaser's death : *Allen v. Pink*, 4 M. & W. 140. There can be no question that the salesman had authority to give the warranty. *Howard v. Sheward*, L. R. 2 C. P. 148, shews that in such a case as the present, the principal would be bound even if he had forbidden his salesman to give a warranty. The question of damages was fairly left to the jury. The learned Judge was right in telling the jury that the respondent was entitled to the differ-

ence between the value of the piano with or without the defect.

September, 20, 1880. Moss, C. J. A.—It is urged that parol evidence is inadmissible to establish a warranty, with regard to which the document signed by the plaintiff is silent. But this objection appears to be founded upon a misconception. The note was not intended to be the evidence or depository of the whole contract. It was designed to show the terms upon which the instrument was in the possession of the purchaser, and its object was to protect the vendor. This character would be sufficiently apparent from the scope of the instrument, and is demonstrated by the evidence of the statements upon which the plaintiff signed.

There is no want of authority to support the reception of this evidence. In *Allen v. Pink*, 4 M. & W. 140, the question was, whether or not evidence could be given of a warranty of a horse, when the defendant had given a receipt stating that it had been bought from him for a certain sum. The principle upon which the Court acted in holding the evidence admissible applies to the present case. That principle was, that there was no evidence of any agreement by the plaintiff that the whole contract should be reduced into writing by the defendant; that the contract had been first concluded by parol and afterwards the paper drawn up, which appeared to have been meant merely as a memorandum of the transaction, or an informal receipt for the money, not as containing the terms of the contract itself. Similar principles are enunciated in *Stanley v. Bailey*, 1 H. & C. 405. The rule is thus stated by Hagarty, C. J., in *Bennett v. Tregent*, 24 C. P. 565, at p. 568: "It is, I think, a question for the jury whether the document called a bill of sale, in which the defendant warrants his title to the vessel, really contains the contract; whether, after discussion and proposal and counter proposal, the real bargain resulted in and is contained in that document. * * But it does not necessarily

follow because there was a writing executed to pass the property which is silent as to any warranty such as is here contended for, therefore no proof of warranty can be received."

These references are sufficient to show that the evidence could not be rejected; and although it may be that in point of form the Judge should have left it to the jury to say whether the writing expressed the whole contract, it is manifest that there is but one conclusion at which they were likely to arrive. No tribunal dealing with facts would be disposed to find that the writing expressed or was intended to express the whole contract. If there should be another trial, it may be worth while to consider whether any evidence of an express warranty is necessary to support the plaintiff's case. It may be that it will appear to be governed by the rule laid down by the Court of Appeal in the elaborate judgment pronounced in *Randall v. Newson*, L. R. 2 Q. B. D. 102. Reference may profitably be made to the language of Brett, L. J., where in formulating the law, after a review of the leading authorities, he points out that if the subject matter of a contract of sale be an article or commodity to be used for a particular purpose, the thing offered or delivered must answer that description, that is to say, it must be that article or commodity, and reasonably fit for the particular purpose. The governing principle is stated to be that the thing offered and delivered must answer the description of it contained in words in the contract, or which would be so contained if the contract were accurately drawn out. This view, however, was not presented to us in argument, and we now do no more than direct attention to it.

The objection that there is no evidence of any authority to the salesman to make the warranty equally fails. The case of *Brady v. Todd*, 9 C. B. N. S. 592, when properly considered, does not yield it any support. There the defendant, who was not a dealer in horses, but a tradesman with a farm, was applied to by the plaintiff to sell him the horse. The defendant sent his

farm bailiff with the horse to the plaintiff and authorized him to sell it for thirty guineas. In holding the defendant not bound by a warranty which his bailiff had assumed to give, the Court proceeded upon the ground that the defendant was not carrying on the trade of dealing with horses; and that it was not proper to establish any rule that the servant of a private owner intrusted to sell and deliver a horse on one particular occasion is, therefore, by law authorized to bind his master by a warranty. This decision does not seem to shake the authority of such cases as *Helyear v. Hawke*, 5 Esp. 72, and *Fenn v. Harrison*, 3 T. R. 757, in which it was held that the servant of a horse dealer can bind his master by a warranty, though as between themselves there was an express command not to warrant, because these were cases of a general agent employed for a principal to carry on his business. The point recently engaged the attention of the same Court in *Howard v. Sheward*, L. R. 2 C. P. 148, where the rule to be deduced from the earlier case (*Brady v. Todd*,) was explained to be that, if the servant or agent of a private individual, entrusted on one occasion to sell a horse, takes upon himself without authority from his master to warrant the soundness of the animal, the master is not bound; but if the servant of a horse dealer, or even one who only occasionally assists him in his business, being employed to sell, gives a warranty, the principal is bound, even though the agent or servant was expressly forbidden to warrant. It is obvious that this doctrine is large enough to cover a warranty given by a salesman entrusted with the conduct and management of a shop or wareroom in which articles are publicly exposed for sale. In this case the absence of actual authority is not proved.

The next enquiry is whether there was evidence reasonably fit to be submitted to the jury in support of the alleged breach. In view of the length of time—from three to four years—allowed to elapse before the plaintiff made any complaint to the defendant personally, and of the somewhat discrepant reasons assigned by the

plaintiff's own witnesses for the existence of the alleged defect, and of the removal of the instrument from one house to another, it would have been no matter for surprise if, upon the plaintiff's own showing, this issue had been found against him. Indeed, a Judge reading the whole testimony adduced might well be inclined to the opinion that there was a large preponderance in favour of the defendant. But these were considerations for the jury, and we cannot say that there was no evidence proper to be left to them, or that there was such a mere scintilla as to justify a nonsuit. But we are clearly of opinion that there was no evidence to support a verdict for the amount which the jury saw fit to assess. The cost of remedying the defect would not equal one-eighth of such amount. No witness gives any clear notion of the depreciation in the selling value of the instrument at the time the purchase was made consequent upon the existence of the defect. Their vague and general statements form no satisfactory basis for estimating the just amount of damage. It was incumbent upon the plaintiff to furnish some reasonably precise evidence upon this point, and it was by no means sufficient to leave it to be arbitrarily settled by the jury. Under the circumstances, the only proper course would have been to allow the plaintiff the sum which at the time of the sale it would have been necessary to expend, in order to remove the alleged defect. It would be absurd to allow the plaintiff what, after years of use, witnesses can be found to name as the present depreciation in value. Strictly speaking then, our course would be to direct a new trial. But as it is for the real advantage of both parties that this litigation should now be closed, we are prepared to order that, if the plaintiff will consent to reduce his verdict to \$50, with a certificate for costs, the appeal shall be dismissed, without costs. If this consent be not given, then the appeal will be allowed, with costs, and the rule made absolute for a new trial, without costs.

If there is a new trial, the question of whether there was a warranty, which does not appear to have been dis-

tinctly left to the jury, will be open, and it will be proper for the Judge to point out to the jury that the proof of its existence depended solely upon the plaintiff's own statement made after a long interval. Upon the question of the breach, the jury's attention should be pointedly drawn to the fact that the warranty, if found, does not extend to the durability of the condition, but is limited to the state at the time of sale.

The plaintiff is to make the election which we have given him within a fortnight.

BURTON, PATTERSON, and MORRISON, JJ.A., concurred.

MITCHELL v. COFFEE.

Distress—Goods in the way of trade—Exemption—Reaping machine.

The defendant distrained for rent a reaping machine on premises leased by him to one G., from whom the plaintiff, a hotel keeper, had the use of the yard and stable. The machine had been left at the plaintiff's hotel about six months before by one R., an agent for the sale of reaping machines, when he was stopping there, and R. had never been at the hotel since, except perhaps on one occasion. The plaintiff was paid nothing for keeping the machine, nor did he assume any responsibility therefor.

At the trial it was sought to prove that it was essential to the plaintiff's business to receive and keep such machines brought by his customers, but the evidence merely shewed that a refusal to do so would or might render his hotel less popular.

Held, reversing the judgment of the County Court, that the machine was not exempt from distress.

APPEAL from the junior Judge of the County Court of the County Court of Wellington.

The declaration charged that the defendant took the plaintiff's goods, that is to say, one phaeton and one reaping machine, and unjustly detained them.

The defendant pleaded not guilty; and avowed that one Goulding was a tenant of his under a demise, and that he took the goods as a distress for rent due thereunder.

To the avowry the plaintiff pleaded that John Reid, an

agent for the sale of reaping machines, being a guest at the plaintiff's hotel, and having in his possession, in the course of his business, the goods mentioned in the declaration, requested the plaintiff to take charge of and safely keep the goods, and that the plaintiff, in the course of his business as hotel keeper, took charge of them, and caused them to be stored and kept for Reid, then being a guest at the hotel, and the same remained to be managed and dealt with in the way of the plaintiff's trade of a hotel keeper until the levying of the distress.

The plaintiff kept a hotel in Guelph, on premises which extended from the Market Square to the south side of Macdonell Street. The plaintiff made use of a stable and yard, under an agreement with one Goulding, to whom the defendant had let. The distress was made on the reaping machine, which belonged to one Watson, while it was in this yard. It was proved that the plaintiff was to have the use of this stable and yard, whenever he required it, and to pay Goulding \$8 a month.

The other facts are set out in the judgment.

The case was tried before the junior Judge of the County of Wellington, and a jury. In answer to certain questions put by the Judge, the jury found that the goods were necessarily on the premises where the seizure took place (at the time of the seizure) to enable the owner to enjoy the benefits of the business carried on by the plaintiff: that the machine was left with the plaintiff to be taken care of in the regular course of his business of an hotel keeper: and that neither Reid nor McQueen (by whom the plaintiff swore at the trial the machine was left,) was a guest at the hotel at the time of the seizure. Upon these findings the learned junior Judge entered a verdict for the defendant. Subsequently a rule *nisi* to set aside the verdict, and enter it for the plaintiff, was made absolute.

The defendant appealed.

The case was argued on the 15th September, 1880 (*a*).

Ferguson, Q.C., and *Walter Macdonald*, for the appellant. The reaping machine in question was not protected by the law which exempts from liability to seizure the goods of a transient guest at an hotel: *Parson v. Gingell*, 4 C.B. 546; *Simpson v. Hartopp*, 2 Sm. L. C. 450, 8th ed. If, however, it is held, that they were protected while the guest was at the hotel, they did not continue to be so after his departure. Nor can it be said that the machine was in the respondent's possession as a warehouseman, as he did not carry on business as such; and he swears that he did not take it in that character. The contention to which the learned Judge gave effect, that the reaping machine was exempt from seizure on the ground that it was necessary for the respondent's business as an hotel keeper to receive and keep such machines, is quite untenable and wholly unsupported by the evidence. It was not shewn that the respondent was a tenant of the yard in which the goods were seized, or at all events it was not a place in which he usually carried on business. They cited *Muspratt v. Gregory*, 1 M. & W. 645; *Hurd v. Davis*, 23 U. C. R. 123; *Francis v. Wyatt*, 3 Burr. 1498; *Brown v. Shevill*, 2 A. & E. 138; *Lyons v. Elliott*, L. R. 1 Q. B. D. 210.

Dunbar, for the respondent. The evidence proves that the respondent was accustomed to receive all classes of goods for his guests, and also to keep them after their departure, and under such circumstances the cases shew that the reaping machine was privileged. *Parsons v. Gingell*, referred to by the appellant, was virtually overruled by *Swire v. Leach*, 18 C. B. N. S. 479, which was subsequently approved of in *Myles v. Furber*, L. R. 8 Q. B. 77. He also referred to *Gilman v. Elton*, 3 B. & B. 75; *Brown v. Arundell*, 10 C. B. 54; *Findon v. McLaren*, 6 Q. B. 891.

September 20th, 1880. Moss, C. J. A. It is urged that the plaintiff in this case seeks to extend the privilege from distress much beyond the point to which it has been carried by any previous case. The question presented by the pleading is, whether a phaeton and

a reaping machine were exempt. There was no ground for contending, and it is not now contended, that the former chattel was protected, and to this extent the verdict, which was for the plaintiff, is admittedly erroneous, and must be corrected.

The question for determination is narrowed to the right of the defendant to levy, as landlord, upon the reaping machine.

From the plea to the avowry it might naturally be inferred that the grievance was, that the goods of John Reid had been distrained while he was the plaintiff's guest. The evidence fell far short of establishing this proposition. Curiously enough the plaintiff had even forgotten the name of the person by whom the machine had been left, for at the trial it was stated by him to be William McQueen. The seizure was in December, while the machine had been placed in the yard as far back as July, and possibly earlier. There was not satisfactory evidence that this person had ever been at the hotel in the interval, except perhaps on one occasion. The plaintiff's own account of the arrangement was, that it was made with him personally—that it was just to put it away for McQueen. Nothing was to be paid for keeping it, and it was not kept with him as warehouseman. He had not, as I understand the evidence, assumed any responsibility for its safety. Upon this state of facts it would manifestly be very difficult to found even a plausible contention that the machine was privileged from distress. But the plaintiff sought to introduce another element, namely, that it was essential to his business that he should keep as well as receive in this manner the machines brought by his customers.

I shall presently examine the general law upon this contention, but it will be proper, in the first instance, with a view to its application, to state the evidence in support of this proposition. The plaintiff himself says: "If I refused to keep goods in that way—if I could not keep commercial travellers' samples, or refused to accommodate by keeping machines, I suppose they would go some

where else." An agent for the sale of such implements swore that persons in his calling generally left the implements at the hotel where they stopped, and that they could not conveniently store them at one place and stop at another. According to him the machines were always at the owner's risk, and the hotel-keepers not responsible. A number of hotel-keepers were examined, the effect of whose statements was, that if persons in their trade refused to keep machines it would drive away custom, and the agents would report against the accommodation of their houses. Hence their practice was, to keep the machines. They never received or claimed any remuneration for this privilege, or made any difference on account of it in the treatment of their guests.

It was upon his view of the effect in law of this practice, that the learned Judge of the County Court set aside the verdict for the defendant, and entered the verdict now under review.

If this case had arisen before *Miles v. Furber*, L. R. 8 Q. B. 77, or certainly if before *Swire v. Leach*, 18 C. B. N. S. 479, there would have been little or no ground for serious discussion. Upon the interpretation placed on the second rule in the leading case of *Simpson v. Hartopp*, 2 Sm. L. C. 450, 8th ed., this chattel would clearly not have been protected. That rule was, that the privilege extended to things "delivered to a person exercising a public trade to be carried, wrought, worked up, or managed in the way of his trade or employ." In a large number of cases that doctrine had been explained and applied. It was shewn that its existence was countenanced by the law for the public good, so that, in the language of Parke, B., in *Muspratt v. Gregory*, 1 M. & W. 645, the exemption ought to be applied in every case in which a chattel is necessarily brought on the premises of the trader, in order to enable the owner to enjoy the benefit of the trade. In the same case, Alderson, B., stated the principle to be, that where in exercising such a public trade at the place, it is necessary that the goods should be delivered into the

custody of the person carrying it on, there the law, in consideration of the benefit which the commonwealth derives from the carrying on of the trade, protects from distress the goods so delivered.

It is to be observed that the discussions, of which those are examples, arose from the attempt to place a signification upon the word "managed," in the second rule given in the principal case. It had been thought to be used as synonymous with "manufactured," but that sense was held to be too limited. In *Muspratt v. Gregory*, 1 M. & W.. 645, Alderson, B., expressed his opinion that the privilege extended both to the working up of goods from their unwrought state into a new form, as a manufacturer, and also to the dealing with the goods as articles of trade, in their original or their wrought state as articles of commerce, as a factor. It will be observed that the principle kept in view was the encouragement of the trade carried on by the person in possession of the premises on which the distress was levied.

In *Parsons v. Gingell*, 4 C. B. 546, the Court made an attempt to classify the cases with the result, I think, of tending to narrow the privilege. The language of the Chief Justice, at p. 559, is: "The general principle of law undoubtedly is, that all goods found upon the premises are liable to be distrained for rent. Upon that general rule two exceptions only are engrafted. The first is, where the article is sent for the sole purpose of having the labour or skill of the artisan performed upon it, and is to be returned to the owner as soon as that purpose has been accomplished. * * The second exception is, where goods are sent to the party's premises in the way of his trade, for the purpose of sale." The question for determination was, whether horses and carriages standing at livery were exempt, and as might be inferred from the language I have quoted, the privilege was denied.

In the case of an inn, a distinction had been drawn between the goods of a permanent lodger, which were not, and of a transient guest, which were exempt from distress,

It may be noted, too, that when the case of *Muspratt v. Gregory* came before the Exchequer Chamber, 3 M. & W. 677, it was laid down that the principle of the decisions in favour of exemption ought not to be extended; and, in obedience to that view, the Court of Exchequer, in *Joule v. Jackson*, 7 M. & W., 450, had held that brewer's casks sent to a public house with beer, and left there until the beer is consumed, were liable to distress. In the case of *Hurd v. Davis*, 23 U. C. R. 123, Draper, C. J., in delivering the judgment of the Court, observed that the Courts in England had determined not to extend the principle of exemption, and that the Court cheerfully yielded to their authority, and adopted the reasons on which they grounded their decision. I may be permitted with great deference to say that I prefer that view which treats the principle as in a state of growth and expansion, and would make the pole star of the decisions to be public policy and general convenience.

Nearly twenty years after the decision in *Parsons v. Gingell*, 4 C. B. 545, the case of *Swire v. Leach*, 18 C. B. N. S. 479, came before the same Court, the membership of which, however, had been all but completely changed. The question there was, whether goods deposited with a pawnbroker as security for advances were protected. So far as I am aware, there has not been in our Courts any subsequent case in which the principle has been examined, and I, therefore, cite some passages to show the views entertained by the eminent Judges who then sat in that Court. Sir Wm. Erle said, at p. 491: "By our law, goods entrusted to persons carrying on public trades, to be by them dealt with, wrought, or managed in the way of their trade, are exempted from distress; and many Judges have attempted to lay down a rule which should embrace all the exemptions: but no very well defined principle is to be found in any of the cases; and in applying it we must be guided as well as we can by the specific instances which have from time to time occurred. It seems to me that the goods now in question fall within the description of goods entrusted

to one who carries on a public trade, to be managed and dealt with by him in the way of his trade, and which he had a right to hold until the sums advanced by him upon them were repaid to him. I must confess I am unable to discover any difference in principle between the the case of a pawnbroker and that of a wharfinger, factor, or warehouse-keeper. In most cases these latter have nothing more to do with the goods than to keep them safely,—the ordinary duty of a public bailee. So, the pawnbroker is bound to take care of and safely keep the goods intrusted to him, and he receives a profit for so doing in the high rate of interest allowed by the statute.”

Williams, J., who had taken part in the judgment in *Parsons v. Gingell*, said: “I think that the goods in question were privileged from distress on the general ground that they were intrusted to the plaintiff, as a pawnbroker, to be taken care of, and dealt with by him in the way of his trade;” and he compared the case to that of goods deposited with a wharfinger to be kept, or an auctioneer to be sold, or beasts sent to a butcher to be slaughtered and dressed. Keating, J., thought that goods deposited with a pawnbroker fell within the second rule in the principal case.

It will not have escaped notice that the Chief Justice points out that a warehouse-keeper, and such persons, have only the ordinary duty of keeping the goods safely; but it is necessary to bear in mind that he is referring to the case of persons whose trade or business it is so to keep goods. So it could not well be denied that the plaintiff might have engaged in the business of taking care of agricultural implements for reward, and might in that capacity have been entitled to protection; but, as Mr. Ferguson has pointed out, he has, by his own evidence, cut away that ground from beneath his feet.

That decision, however, seemed difficult to be reconciled with *Parsons v. Gingell*, 4 C. B. 545, but the Court of Queen’s Bench, in the recent case of *Miles v. Furber*, L. R. 8 Q. B., 77, held that if there was any discrep-

ancy, the more recent authority was to be preferred. The point decided was, that goods, left in a depository to be warehoused at an annual rate, were privileged. The ground of the decision, as stated by Cockburn, C. J., was, that if the goods deposited were liable to be distrained, it would affect the very existence of the business. Archibald, J., observed that the principle, on which exceptions in the case of certain trades have been engrafted on the general liability, appears to be, that the trade or business could not be carried on except the goods were privileged from distress.

In the very recent case of *Lyons v. Elliott*, L. R. 1 Q. B. D., 210, the Court had to consider the peculiar case of plate delivered to an auctioneer to be sold, and placed by him not in his own store, but upon premises on which rent was in arrear by another person, whose goods he was also selling. To such a case the privilege was held not to extend; and the learned Judges in pronouncing judgment, took occasion to examine the general doctrine. Blackburn, J., restated the familiar principle that the ground of the privilege is public policy for the benefit of trade, and that the privilege is given to the person carrying on the trade: that is, where goods are intrusted to a person, in order that he may exercise his trade upon them, they should be privileged from distress at the suit of the landlord of the premises where the trade is exercised. His statement of the principle is, "that where a person occupies certain premises and carries on a public trade there, goods which are brought to those premises for the purposes of that trade, are privileged."

In the case of *Hurd v. Davis*, 23 U. C. R. 123, to which I have already referred, goods consigned to a person, with prices named in the invoice below which he was not to sell, and any excess on which he was authorized to retain for himself, were held not to be exempt.

Applying these principles in the most liberal spirit, for the private benefit of the plaintiff and the promotion of public convenience, which I anxiously desire to do, I am

constrained to hold that a case for exemption has not been established.

It cannot be pretended that the taking charge of such goods—still less their retention for many months—is essential to the existence of the business of a hotel-keeper.

The utmost extent to which the evidence reaches is, that a refusal by the landlord might or would render his house less popular. He did not keep the chattel for one who was a guest. The agent of the owner might never again come beneath his roof. He did not hold it as warehouseman for reward, or as an agent for its sale, or that it might be dealt with by him in his trade or business. If the view of the law adopted by the learned Judge were correct, there would have been no occasion for legislative interference to protect the goods of lodgers or traders left with their immediate landlord; and the English Statute, as well as our own, (43 Vic. ch. 16, O.), would have been unnecessary.

While, therefore, I feel every disposition to restrain within its strict boundaries a law which authorizes the sale of one man's property for another's debt, and which is often productive of cruel hardship and abominable oppression, I am obliged to hold that here the landlord has not exceeded his legal right. The appeal must, therefore, be allowed, with costs, and the rule *nisi* in the Court below, to set aside the verdict for the defendant, discharged.

BURTON, PATTERSON, and MORRISON, JJ.A., concurred.

Appeal allowed.

COOPER ET AL. V. BLACKLOCK.

Promissory note—Per procuration—Authority of husband to sign.

Upon the insolvency of J. B., who carried on business under the name of B. & Co., his wife purchased the estate from his assignee. The business was continued under the same name, and was entirely managed and controlled by J. B. for his wife, who authorized him by power of attorney to manage the business, and to make promissory notes in and about her said business.

Being pressed for payment of notes, which he had given for a debt due before his insolvency, he gave his creditor notes signed *per pro*. B. & Co. J. B. Subsequently he was sued on these notes, when he swore they were his wife's notes, and made with her authority, whereupon the holder sued the wife.

In the action against her she swore that she had separate estate, and that she had purchased her husband's estate with it; but, on the advice of her counsel, she declined to give any information concerning it. She swore that J. B. had no authority to give the notes in question, but it appeared that he frequently discussed his own affairs with her, and he would not swear that he did not tell her that he had given these notes.

Held, affirming the judgment of the County Court, that notwithstanding the power of attorney the real scope of J. B.'s agency could be ascertained from any admissible evidence, and that there was sufficient to justify the finding of the learned Judge that J. B. had authority to sign the notes.

APPEAL from the County Court of York.

The defendant, who was the wife of one John Blacklock, was sued upon promissory notes, signed "*Per pro* Blacklock & Co.—John Blacklock."

The only plea was *non fecit*.

The defendant was said to carry on, under the name of Blacklock & Co., the business of the manufacture of woollen cloth, which her husband carried on in his own name before his insolvency.

The notes were signed by John Blacklock; and the issue really was, whether or not that signature was binding on the defendant.

The evidence at the trial was that of John Blacklock, who was examined *vivâ voce*, and that of his wife, whose deposition, taken before a special examiner, was read.

It was shown that John Blacklock had himself been sued on these notes, and had defeated the action by swear-

ing that they were the notes of his wife, made by him under her authority. His evidence in this case was directed to show that he had no authority from her to make them, and so they were not her notes.

Mrs. Blacklock stated that she bought the machinery and stock, which had been used by her husband in his business, from his assignee in insolvency. She said she had separate estate, but declined to say what capital she put in the business, or where she got the separate estate, or to give the names of any parties with whom she had had business dealings. She said she could answer, but would not on advice of her counsel; and she parried in the same way questions respecting the profit or loss shewn by statements of the affairs of the business, saying that she would answer any question as to the making of the notes sued on, but that she was advised not to answer any others, and that she would not. The concluding lines of her deposition contained the following statement of her defence: "I contend that John Blacklock had no authority to make these notes sued on, as they were not made in connection with the business of Blacklock & Co.; and I further contend that I am not liable on them in any way."

It was clear, from the evidence of both husband and wife, that the whole management of the business was in the hands of the husband; that the wife took no part in carrying it on, and knew nothing of it beyond what a wife may casually know of her husband's affairs or business. The husband said in his evidence, "I managed the business of Mrs. Blacklock. I used her name it is quite true, but Mrs. Blacklock attends to the business when I am not there. She did not buy the goods. I bought the goods and sold them. I was her general manager. I did everything about the business when I was at home."

There was a formal power of attorney from the wife to the husband empowering him to manage the business of Blacklock & Co., and, *inter alia*, to make promissory notes in and about her said business.

The notes in question were given for an old debt of the

husband due before his insolvency, to the firm of Kent Bros. who were pressing for payment, and stated to have been barred by his discharge.

The other facts are stated in the judgments.

The case was tried before the learned Judge of the County Court of the County of York, without a jury, who rendered a verdict for the plaintiffs, and after argument in term, adhered to that decision.

The defendant appealed.

The case was argued on the 22nd September, 1880 (*a*).

Ferguson, Q. C., for the appellant. It was not proved that John Blacklock had any authority to sign the notes in question. The fact that he signed them *per proc.* was notice to every one that his authority was limited, and these notes being clearly outside of the power of attorney the respondents were not entitled to recover. He cited *Smith v. McGuire*, 3 H. & N. 554.

McMichael, Q. C., for the respondents. The use of the word *per proc.* did not limit John Blacklock's authority to sign notes merely for the purposes expressed in the writing, if, as was shewn by the evidence, he had really a greater authority. It was established at the trial that the husband managed the business, which really belonged to him, and that he had power to give notes for any purpose he might think proper. Moreover, the learned Judge expressly found that he had authority to sign the notes sued on. He cited *Stagg v. Elliott*, 12 C. B. N. S. 373; *Meakin v. Samson*, 28 C. P. 55; *Re Gearing*, 4 App. R. 173.

Ferguson, Q. C., in reply. There is nothing in the evidence to prove that he had any authority to give notes except for purposes connected with the business of Blacklock & Co.

September 25, 1880. Moss, C. J. A.—I think that the judgment of the learned Judge of the County Court ought

(a) *Present*.—Moss, C. J. A., BURTON, PATTERSON, and MORRISON, JJ. A.

to be affirmed. I desire to found my conclusion upon the opinion that there is sufficient evidence to justify his finding that her husband had authority from the defendant to sign promissory notes for any purpose he pleased. It is true that the power expressly conferred in writing is not so extensive, but it is clear, both upon reason and authority, that the limits of his authority need not be found within its four corners. Notwithstanding its existence, the real scope of the agency may be ascertained from any admissible evidence. I do not propose now to enter upon a scrutiny of the evidence and a comparison of its more material points. I direct attention to the following points, which are, in my opinion, fairly deducible from the testimony of Mr. and Mrs. Blacklock. The husband and wife concur in the statement that he managed and controlled the business. The knowledge of what was going on was wholly derived from the communications he chose to make. He was the ostensible owner of the business. He was in the habit of talking to her about his own affairs, that is, his position as an undischarged bankrupt. He will not swear that he did not tell her that he had signed the name of Blacklock & Co., to the accommodation notes.

If then the learned Judge inferred that she knew all about the note to Kent Bros., who were troublesome creditors, I cannot say that he was wrong. Upon the whole, I am of opinion that a finding by a jury that there was authority to sign the name of Blacklock & Co., to this promissory note, might well be supported by the Court, and that there is no reason for disturbing the conclusion arrived at by the learned Judge. Its justice will be recognized when it is shewn that the plaintiffs failed in an action against Blacklock, because he swore that the note was that of Blacklock & Co.

I do not base my judgment upon the probability, high as I believe it to be, of the beneficial ownership of the business being in the husband: firstly, because that issue does not seem to have been directly presented at the trial;

and, secondly, because the defendant cannot be sued unless she is possessed of separate estate, and this business is the only property to which she has been shewn to have a claim. The appeal should be dismissed, with costs.

BURTON, J. A.—I entertain no doubt whatever of the correctness of Mr. Ferguson's contention, that where a bill or note upon the face of it purports to be accepted or made per procuration, it is a notice to all the world that the person who signed it has but a limited authority, and that whoever takes it does so at his own peril, and I think it to be clear, speaking for myself, that the power of attorney which has been given in evidence gave no authority to John Blacklock to sign for other than trade bills or notes.

But that does not conclude the question. There was other evidence given as to the relationship of the defendant and her husband in connection with the business, and as to this particular transaction ; and the point for our decision, it appears to me, is, whether there was any evidence upon which a jury might reasonably have found that he was authorized to sign these notes, which were not given for the business, but for a debt of his own, as to which, however, both he and his wife might have dreaded hostile proceedings. I say this because there is no evidence of how the defendant obtained the means to purchase the goods which formerly belonged to her husband's estate. It is quite possible that she might have been in a position to explain the purchase satisfactorily, but she declined to do so, and I can scarcely complain if the learned Judge, deciding as a jury, drew an unfavourable inference from her silence.

What I regret particularly to see is, that she did so under advice. It is no part of a professional man's duty, under such circumstances as appear in the present case, to offer any advice to a witness or to a client as to what evidence he should give or refrain from giving, but, on the contrary, such a course is open to the gravest animadversion. He should be as anxious as the Court itself that the whole facts should be elicited. It is proper of course for

him to see that none but legal evidence is offered against his client, and he is at liberty to deduce such inferences from the evidence in his client's favour as he thinks the facts warrant, and endeavour to impress the Court with that view by argument, but there his duty ends.

It appears then that the defendant declined to offer any explanation as to her purchase of the property. The witness John Blacklock says that he discussed his business with the defendant a good deal, and is unable to say positively that his wife knew nothing of the signing of the notes, and he himself supposed that he had authority to give them. In another portion of his evidence he says that he does not think she knew about the renewals, does not think he mentioned anything to her in reference to that; from which it would not be an unnatural inference that he did speak to her about the originals; but at all events he will not swear positively that he did not tell her about them.

We thus have the fact that Mrs. Blacklock, under advice, declines to give any information as to how she made the purchase: that her husband, when the original notes were given, had not obtained his discharge: that it was quite possible that if these notes had not been given, danger was apprehended: that he did discuss his affairs with his wife; and he is unable to say that he did not mention to her that he had signed for her these notes and those of which they are renewals. I do not feel myself justified in saying that the learned Judge might not unreasonably draw the inference that she did either authorize or ratify these notes, and so properly find for the plaintiffs; and it must be gratifying to the witness, John Blacklock, that we are enabled to confirm the Judge's decision, and thus enable him to carry out his proposed intention "of obliging a poor man," which a contrary decision would defeat.

I rejoice also that we are able to sustain it, and thereby avoid the scandal to the administration of justice which a contrary one would involve, viz., that a party should be allowed, first, to evade liability on the score

that he was a mere agent, and on his alleged principal being sued shield her from liability on the ground that the authority had been exceeded; and I think I can foresee what would have been the next turn in the kaleidoscope if this move had been successful: namely, that the agent believed himself to be authorized and so should not be made liable either on the ground of fraud or on an implied warranty of the authority.

I think no sufficient grounds have been shewn for interfering with the verdict, and this appeal should be dismissed, with costs.

PATTERSON, J. A.—The contention is, that the power of attorney did not authorize the making of the notes in question, and that there is no evidence of authority outside of it.

Reverting to the facts in evidence, we find John Blacklock conducting the business, which confessedly was once his, and which, to one who knew only what he saw, would seem to be still his, and his alone. He used the name of Blacklock & Co., but, as I gather from the defendant's deposition, the inquirer would search in vain for any registered declaration of partnership. The enquirer's assumption that the interest in the business was really that of the husband would be natural, and would not be removed even by a conversation with the defendant, if she happened to display the same reticence as when she was examined in this case. Taking the apparent position of affairs, and the defendant's refusal to explain the nature or extent of her interest, as she was advised to refuse at her examination, he would be justified in concluding that the business was in reality that of the husband. I am inclined to think that conclusion would not be far from the truth.

Then, having regard to the fact that these notes do not create a debt binding the defendant personally, but only afford the means by which the separate property of the defendant can be charged with their payment; and that the property to be treated as separate property includes

the assets of this business, and so far as appears is confined to the business ; and further, keeping in view the facts which suggest caution in relying upon the evidence of either husband or wife : namely, the husband's evidence in the former suit, which was the opposite of what he attempts to give in this one ; and the stand taken by the wife in this suit when she insisted in defining for herself the evidence proper to be given upon the issue, and confining the information she gave within the narrow limits she had laid down, acting evidently under the very erroneous idea that the authority must be found in the terms of the power of attorney, and could be found no where else, we are not prepared to say that the finding of the learned Judge is unsupported by evidence, and we should in our opinion be doing injustice if we disturbed it. The appeal must be dismissed, with costs.

MORRISON, J. A., concurred.

Appeal dismissed.

THE COUNTY OF HASTINGS V. PONTON.

Registrar—Excess of fees under R. S. O. ch. 111—Action for.

The plaintiffs sued the defendant for the proportion of fees received by the defendant as registrar, to which they were entitled under R. S. O. ch. 111 secs. 98 to 103. The defendant demurred to the declaration on the ground that these sections were *ultra vires* of the Local Legislature, as they imposed an indirect tax, and not a tax for raising a revenue for provincial purposes.

Held, affirming the judgment of Armour, J., that having received the money in question under the above Act, the defendant could not deny that he received it for the purposes therein provided.

Held, also, that if a tax at all, it was clearly a direct tax, and *intra vires*.

APPEAL from the judgment of Armour, J.

Declaration: For that during all the year 1877, and before the commencement of this suit, the defendant was and still is the Registrar of the County of Hastings, and as such received and had for the said year commencing on the 31st of December, 1876, exclusive, to the 31st of December, 1877, inclusive, all the fees and emoluments pertaining to the said office: that on the 15th of January, 1878, the defendant made a return under oath of the fees and emoluments so received by him during the said year, to the Lieutenant-Governor of the Province of Ontario: that the fees and emoluments of the said office of the said defendant, as Registrar of the County of Hastings during the said year, computed as aforesaid, and as returned by him, were in all the sum of \$6,823. The declaration then alleged the proportion of the fees to which, under the statute, R. S. O. ch. 111, the plaintiffs and defendant were respectively entitled, and claimed the payment of the balance due to them by the defendant on account of such moneys.

Demurrer, that sections 98 to 104, inclusive, of R. S. O. ch. 111, referred to in the first count, whereby they direct the Registrar to pay to the Treasurer of the County, for the uses of the municipality, the certain proportion of the fees and emoluments received by him during the preceding year, are unconstitutional and invalid, as beyond the powers of the said Legislature to enact, as defined by "The British

North America Act, 1867," inasmuch as they impose an indirect tax, and not a tax for raising a revenue for provincial purposes, and are inconsistent with section numbered ninety-two, which allows to the Registrar certain fees for the several services therein mentioned.

The demurrer was argued before Armour, J., who gave judgment for the plaintiffs.

The case was argued on the 13th September, 1880 (a).

Bethune, Q. C., for the appellant. It is submitted that sections 98 to 103 of R. S. O., ch. 111, are *ultra vires* of the Local Legislature. It has been attempted by these sections to impose a tax either upon Registrars or upon persons who register deeds in the Registry Office, for the benefit of municipalities. It is clear that this cannot be supported as a direct tax upon the defendant, as it is not a tax in order to raise a revenue for provincial purposes, and therefore not within the meaning of section 92 of the B. N. A. Act; nor as an indirect tax, as it is contrary to the Act just referred to, which does not give power to the Provincial Legislature to levy an indirect tax for any purpose except in so far as is mentioned in sub.-sec. 9 of section 92: *Leprohon v. Corporation of the City of Ottawa*, 2 App. R. 526, 560; *Attorney-General v. Queen Insurance Company*, 16 C. L. J. N. S. 198; *United States v. New Orleans*, 8 Otto. 381; *Cooley on Taxation*, 23. The whole scope of the B. N. A. Act shews that it was not intended to allow a greater power of taxation for municipal purposes than was given for provincial purposes, and that it was not intended to allow under the term "Municipal Institutions in the Province," an unusual tax of this nature to be imposed in aid of municipal institutions, but that, if any power of taxation was intended to be conferred by implication, it should only be such power as would of necessity be implied, and that should be confined to real or personal property within the municipality, and to shop, saloon, and other licenses.

(a) *Present*.—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, J.J.A.

McMichael, Q. C., for the respondents. The charges authorized by the section in questions are simply a compensation to a public officer for work done in place of a fixed salary. They are not a tax within the meaning of the B. N. A. Act, but if so, they are a direct tax within the competence of the Local Legislature.

September 20, 1880. PATTERSON, J. A.—The form of declaration adopted in this case has the merit of presenting the facts so fully as to make it possible to dispose of the legal question on demurrer, without the expense and delay of a trial, or of any merely formal proceedings. The result, however, of the facts set out is, that the plaintiffs are suing for money received for their use. I am inclined to think that the principles applicable to an action for money received, may be found sufficient for the decision of the case, without an exhaustive discussion of the constitutional questions which the defendant has proposed for solution.

The action is for money received by the defendant, whose only authority to receive it was the statute law of Ontario, which declared that, to the extent to which he is now charged, he was to receive it only for the purpose of paying it over to the plaintiffs. A form of action appropriate in these circumstances is, "money received for the use of the plaintiffs"; as was decided in the case of *The Mayor, &c.. of Harwich v. Gant*, 5 E. & B. 182.

To the demand for the money the defendant does not make any such answer as that he did not receive it, because it was an illegal tax which he declined to be the instrument of exacting; but, admitting the receipt of the money, under the circumstances set out in the declaration, he maintains that it is his right as against the plaintiffs to keep it himself.

I confess my inability to discern any justification for such a contention.

The Legislature, in its undoubted jurisdiction over property and civil rights in the Province, has assigned a certain effect to the registration of deeds and other instru-

ments affecting the title to land; as it has, by other statutes, to the filing of bills of sale, and certain declarations of incorporation and other documents; and it has provided the machinery whereby persons can, if they choose, avail themselves of the advantages of registration; and it has further fixed the rate at which such persons are to pay for the service they require. It has not been contended that these services can, on any ground of right, be claimed gratuitously.

If any one is unwilling to pay what is demanded, either because he supposes the demand to be illegal, or unreasonable, or for any cause short of the assertion of a right to have his deed registered without paying, he can avoid the payment by keeping his deed unregistered. Registration is not compulsory. There are, no doubt, risks to be run by neglecting to register; but the law that created them is beyond question *intra vires*. When a person, then, decides to register, and pays the price fixed for the service, or avails himself of the registration system in any other way, as by investigating a registered title, and pays for the search, there is no reason to be found for saying, nor has it been suggested, that he could have any pretence for recovering back what he has paid. The payment is neither immoral nor illegal.

Then consider the position of the defendant. He holds his office under legislative provisions enacted in the exercise of one of the functions given exclusively to the Provincial Legislature, viz.: "The establishment and tenure of Provincial offices, and the appointment and payment of Provincial officers." His payment is regulated by the amount of work done in his office; and, by the combined effect of the Statutes 31 Vic. ch. 20, and 37 Vic. ch. 27, which were in force when the transaction in question took place, and are now combined in R. S. O. ch. 111, it consisted of all the fees paid up to a certain amount, and a proportion of those over that amount, the surplus being appropriated by the statute to the municipality, at whose expense the buildings and some other requirements were provided.

Now, apply to these positions the doctrine enunciated by Lord Ellenborough, in *Griffith v. Young*, 12 East 513, respecting the action for money had and received: "If one agree to receive money for the use of another upon consideration executed, however frivolous or void the consideration might have been in respect of the person paying the money, if indeed it were not absolutely immoral or illegal, the person so receiving it cannot be permitted to gainsay his having received it for the use of that other;" and we have facts and authorities entirely destructive of any defence which this defendant can attempt.

Besides this, many authorities could be referred to which prove that even the taint of illegality, attaching to the receipt of money by one in the character of agent, will not, at all events so long as it has not been claimed from him by some one really entitled to it, enable him to deny that it is received for the use of his principal. Cases of this class are *Bone v. Ekless*, 5 H. & N. 925; *Bonsfield v. Wilson*, 16 M. & W. 185; *Hardman v. Willcock*, 9 Bing. 382 n.; *Biddle v. Bond*, 6 B. & S. 225.

But I am far from being convinced that there was any excess of legislative jurisdiction in passing the Act 37 Vic. ch. 27 O.

The contention is, that either the charge for registration is a tax on the person who has to pay it, or the demand upon the registrar to pay over the excess, beyond what is designated as his share of the fees and emoluments, is a tax upon him; and that in either case the tax is not one which the British North America Act permits the Provincial Legislature to impose.

I think that it is a mistake to call it a tax at all. In the one case it is the charge made by legislative authority for a service actually done. In the other it is the appropriation of the money to the remuneration or reimbursement of the parties or bodies politic who take part in rendering the service.

But, if it can be properly called a tax, it is clearly a direct tax, whether we regard the single fee for one regis-

tration, or the surplus payable at the end of the year to the municipality.

“A direct tax,” says J. S. Mill, “is one which is demanded from the very person who, it is intended or desired, shall pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another: such as the excise or customs.”

Mr. Bethune endeavoured to bring the plaintiffs' demand within the second branch of this definition; but, to my mind, unsuccessfully.

One of the subjects placed within the exclusive legislative jurisdiction of the Province is, “direct taxation within the Province, in order to the raising of a revenue for provincial purposes”; and it has been authoritatively decided that to hold that this authorizes direct taxation only for the purpose of raising a revenue for general provincial purposes, that is, taxation incident on the whole Province for the general purposes of the whole Province, would be giving to the clause a limited construction for which the statute affords no ground: *Dow v. Black*, L. R. 6 P. C. 272.

I have no doubt that it is our duty to dismiss the appeal, with costs.

MOSS, C.J.A., BURTON and MORRISON, JJ.A., concurred.

Appeal dismissed.

COWLING V. DICKSON.

Landlord and tenant—Covenant to deliver up possession on notice of sale—False notice—Action for.

By a covenant in a lease of a farm from defendant to the plaintiff, it was provided that upon receiving six months notice from the lessor that he had sold the farm, and upon receiving compensation for all labour up to the date of the notice, from which he had derived no return, the lessee would deliver up possession at the end of six months, the compensation being duly paid. Defendant served the plaintiff with a notice that he had sold the farm, in consequence of which the plaintiff desisted from putting in crops, and other work for which he had made preparation, and rented another farm. Upon ascertaining that the notice was untrue, the plaintiff refused to give up possession, and sued the defendant for false representation.

Held, reversing the judgment of the Q. B. 45 U. C. R. 94, that the plaintiff was entitled to recover the damages sustained by him in consequence of the notice.

APPEAL from a judgment of the Queen's Bench, setting aside a verdict for the plaintiff and entering a nonsuit, reported 45 U. C. R. 94.

This action was brought by the plaintiff, who was a tenant of the defendant, for damages caused by false representations on the part of defendant. The plaintiff rented a farm from the defendant, for the term of ten years. In the lease there was a condition that the landlord, in the event of his selling the property, might terminate the lease by giving the tenant six months' notice, and paying him for any labour he had expended before the date of notice, and for which he had received no return. The plaintiff alleged that the defendant made a false representation that he had sold the property, and on the 11th of July, 1877, served the plaintiff with the notice provided for in the lease, and in consequence the plaintiff had to stop all work on his farm, and by reason of this sustained loss, to recover which this action was brought, the fact being that there was no sale as represented by defendant.

The case was argued on the 14th September, 1880 (*a*).

The Court called on the counsel for the respondent to begin, and said that as they must assume that there was a

(*a*) *Present*.—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

false and fraudulent representation by the defendant in giving the notice, the only question to which it would be necessary for him to direct his argument was, whether the damages were something in the contemplation of, and referable to, the fraudulent conduct of the defendant.

Drew, Q.C., for the respondent. We admit that the representation was untrue, but we do not concede that it was fraudulently made for the purpose of inducing the appellant to act upon it. On the contrary, the evidence shews that he acted in good faith in giving the notice, as when the notice was given he believed that he had sold the farm. The effect of the respondent's admission at the trial was merely that he had not made a valid sale, owing to the absence of any written agreement. But the appellant admits that he did not believe that the farm had been sold, and that being the case, he cannot recover in this action. By retaining possession he waived any claim to compensation as the lease provides for compensation upon his acting on the notice. Inasmuch as the respondent believed he had sold the place, if liable at all, he can only be for nominal damages. The evidence does not shew that the appellant refrained from sowing fall wheat and doing fall ploughing on account of the notice. It did not require him to leave off doing fall ploughing and not to sow fall wheat, and the respondent could not have contemplated that he would have done so, and if he acted differently from what he was required to do and from what the respondent contemplated, and thereby suffered loss, the respondent is not liable. He cited *Pow v. Davis*, 1 B. & S. 220; *Collins v. Cave*, 6 H. & N. 131; *Shrewsbury v. Blount*, 2 Scott. N. R. 588, 2 M. & G. 475.

Dunbar, for the appellant.

September 20, 1880. Moss, C.J.A.—Upon a perusal of the evidence the damages might seem to be assessed on a liberal scale; but if the action be sustainable these were peculiarly within the province of the jury to fix, and the

learned Judge who tried the case, and is best qualified to form an opinion upon this point, is so far from deeming them excessive, that he has characterized them as very reasonable. If, therefore, we are of opinion that the nonsuit was erroneous, there is no ground for directing a new trial. Our sole concern is, to consider whether there is a cause of action.

The question arises upon a special clause contained in a lease made by the defendant to the plaintiff, whereby the lessee agreed that upon receiving six months' notice from the lessor that he had sold the demised premises, "and that the same has been sold," then upon receiving compensation for all labour from which he had not received any return, he would deliver up possession at the end of the six months' notice, the compensation being first paid. It does not appear to be difficult to perceive the objects aimed at by this agreement. The defendant wished to be free to sell notwithstanding the demise. He was willing to pay for labour, as yet unremunerative, up to the date of the notice. If, thereafter, the plaintiff chose to incur labour or expense upon the premises, he could not claim compensation, but the space of six months was allowed him to look about and procure another house.

If the agreement had been honestly carried out, no difficulty need have arisen. But the defendant, being possibly dissatisfied with the amount of the rent, or having some other object of his own to serve, in July, 1877, served the plaintiff with a notice that he had sold, and required delivery in accordance with the agreement. In consequence of this notice the plaintiff, as he swore, and as the jury manifestly believed, desisted from certain operations for which he had made preparations, and rented another farm.

The learned Judge has reported that it was admitted at the trial that there was no sale, and that the only question was, that of the damage sustained by the plaintiff. The majority of the Court of Queen's Bench were of opinion that the plaintiff could not recover because, upon discover-

ing the deceit that had been practised upon him, he did not actually leave the premises, but remained in possession. The object of the defendant being to compel or induce the plaintiff to leave, effect was given to the objection that he had not, in the language of the learned Chief Justice, "done the act contemplated." Mr. Justice Cameron put his judgment upon the ground that the wrong contemplated by the defendant was not effected. Mr. Justice Armour, in dissenting from the views of the other Judges, pointed out that the plaintiff's right was not founded upon contract, as he thought had been assumed. It appeared to him to be clear that if the plaintiff had gone out of possession altogether he could have recovered for the whole damages he so sustained, and if he went half out there was no rule of law to prevent him from recovering compensation for the injury he had sustained up to that point.

The best opinion that, after careful consideration, we have been able to form is, that the latter view is entitled to prevail. We cannot discover the principle upon which it ought to be held that because the plaintiff did not yield up possession, and thus pursue the precise course for which the defendant had hoped, he should be left remediless. With great deference to the contrary opinion, it appears to us to be a mistake to assume that the relations between the parties, arising out of the defendant's wrongful conduct, are governed by the rules relating to breaches of contract. This seems to follow from the consideration that the agreement did not contemplate, or assume to provide for, the contingency of the defendant attempting to put it to a fraudulent use. We are not aware of any authority for the doctrine, which does not appear to be well grounded in reason or justice, that because the plaintiff's conduct did not precisely correspond with the defendant's expectations, the defendant should be sheltered from the consequences of his deceitful conduct. Adopting the position most favourable for the defendant, he cannot object to the plaintiff's proceeding, if it were that which a reasonable and prudent man might take in

reliance upon the honesty of the notice. Now, referring to the agreement, was not the plaintiff's course precisely of that description? He did not continue labour from which he could have derived no return; he incurred expense in procuring another farm. He did just what he might have been expected to do, if the notice were valid. In thus acting he suffered loss, which we think the defendant should now bear.

Even granting the entire applicability of the cases of *Langridge v. Levy*, 2 M. & W. 519, and *Mullett v. Mason*, L. R. 1 C. P. 559, they are quite in harmony with the principles upon which this action is maintainable. For example, referring to the language of Willes, J., in the latter case, it may well be asked was it not necessarily in the contemplation of the parties, that upon the receipt of a *bonâ fide* notice the plaintiff would desist from work upon the premises for which he could not receive direct return, and would arrange for a change of abode? This view does not in the least conflict with the cases in which it has been held that an aggrieved person is without remedy, because the damage is not the proximate natural result of another's breach of duty. It is only necessary to glance at such authorities as *Walker v. Goe*, 4 H. & N. 350, *Barber v. Lesiter*, 7 C. B. N. S. 175, and *Collins v. Cave*, 6 H. & N. 131, to perceive in what remoteness consists. For example, in the last named case, the right to recover was put upon the fact that the defendant, with the malicious and fraudulent intention of inducing one Collins to sue the plaintiff, had written a letter purporting to be addressed to the plaintiff, but sent to Collins, stating that a certain agreement, which the defendant alone could prove, had not been made, and that Collins had consequently brought an action, in which he recovered. It is needless to direct attention to the difference between such a complaint, and that with which we are now dealing.

We think that the appeal should be allowed, with costs, and the rule *nisi* in the Court below discharged.

BURTON, J. A.—The learned Judge who tried the case noted that it was admitted that there was no sale, and that the only question was one of damages.

The counsel for the respondent wishes now to contend that a restricted meaning should be placed upon the admission, and that it should be read, not as admitting that there was no sale in fact, but no valid sale, in consequence of its not being in writing. But that is manifestly not the view taken of the matter by the learned Judge, who places it beyond dispute by adding, after the admission that there was no sale, the further admission that the only question was one of damages, which would not have been the case if the defendant on the strength of a verbal contract of sale had given the notice; whereas we find the learned Judge throughout his charge treating it as a representation falsely and wilfully made, and the sole enquiry one of damages, to which no exception was taken at the trial, nor any motion made subsequently to set aside the verdict for misdirection. The question has therefore to be treated as one in which it was admitted that the notice was given without any justification under the contract.

There is another point taken, which, if borne out by the evidence, would have disentitled the plaintiff to recover, viz., that the plaintiff did not himself believe that the farm had been sold. But here again the defendant does not appear to have urged that there was any evidence upon which the jury could have found that fact in his favour, or to have requested the Judge to submit any such question. It is impossible to read the evidence without seeing that it was not until some time after receiving the notice that the plaintiff became suspicious that the notice had been wrongfully given, and he then warned the defendant of the consequence, but the defendant reasserted so strongly that he had sold it, that the plaintiff acted upon his representation, and took another farm.

The question, therefore, is confined to the single point of whether an action is maintainable upon the facts proved.

The case was first tried before myself and a jury, when a much larger verdict was rendered. No such question was then raised, and, as a matter of first impression, I thought it clear that the plaintiff was entitled to recover; the majority of the Court of Queen's Bench having held differently, I have naturally felt a doubt of the correctness of that impression, but as, after reading these judgments with much care, I have been unable to concur in them, I am pleased to find that the learned Chief Justice arrived at his conclusion with much hesitation.

I entertain no doubt, as the Chief Justice has put it, that when a landlord gives such a notice as this the tenant has the right to act upon it as true, even although he finds before the expiry of the notice that the landlord had no right to give it; but why, when he has partially acted upon it before he discovers the true state of things, he should be without remedy, is not made clear to me by anything stated in the judgment of either of the learned Judges, or by anything which has been urged before us upon the argument.

The defendant has no right here, any more than in the case suggested by the Chief Justice, to say that the plaintiff was wrong in giving him credit for the truth of what he impliedly said when he gave the notice. That notice amounted to this in effect: I shall require possession of the premises in six months; for all labour expended up to date of notice for which you have received no return, I will make compensation, but not for anything you may do subsequently. The plaintiff, relying upon the notice being given *bonâ fide*, does abstain, and so suffers injury; and it seems to me to be beyond question that that injury and damage naturally flowed from the plaintiff's confidence in the defendant's false assertion.

The plaintiff, under his contract, took the risk of that loss, if, in point of fact, the contingency arose upon the happening of which alone the defendant was entitled to terminate the lease. But the determination of the lease was not the only consequence resulting from the notice.

In connection with the condition it amounted to a prohibition to cultivate the farm. No prudent man would, on such a notice, expend further labour on the farm, except for the purpose of removing his present crops.

And if it should turn out that, in point of fact, the notice was wrongfully given, it would be strange if the tenant were without a remedy. In the case suggested by the learned Chief Justice, of a sale made but not completed for some cause beyond the control of the vendor, the tenant might be without remedy, because a material ingredient in the action would be wanting—the falsehood and fraud of the defendant in making the representation; although having given the notice, it would not lie in his mouth to say it was not valid, if the tenant chose to leave in consequence of it.

It is to be borne in mind that this action is not based upon breach of contract, but solely on the wrongful giving of a notice as if it were warranted by the contract, and that the measure of damages is not so strictly confined as in actions upon contract. The question is, whether the damage complained of is the natural and reasonable result of the defendant's act. How can it be said that the loss, arising from the abstaining to cultivate the farm, was not such a consequence as from the ordinary course of things would flow from giving this notice. If rightfully given, it was a loss the plaintiff contracted to bear; if wrongfully given, it was a loss which in justice, and I think in law, the defendant, the wrongful originator of that loss, should be liable to make good. Still more so in a case where we find that the act was done with a view to securing an unfair advantage to himself.

It is said that it was a matter that should have been provided for by the contract itself. But why? The contract was unfavourable enough for the plaintiff, but he was willing to abide by it; and if acted upon in good faith he could have no proper ground of complaint. Surely it should not lie in the defendant's mouth to say, "I have misled you to your injury by pretending that the notice

was given in pursuance of the terms of the contract, but you ought to have been sharp enough to know that I might fraudulently give a notice for some purpose of my own, and should have guarded against that in the contract."

It is also said that the abstaining from putting in crops was not a necessary consequence of the alleged fraud. As to that, it seems to me that it was a reasonable and natural thing for the plaintiff to do under the circumstances; and as he has given evidence to prove that he did abstain from sowing solely on this account, it became incumbent upon the defendant to shew that there were other reasons which induced him to do so.

We have nothing now to do with the amount of the damages. That was a ground upon which the Court of Queen's Bench were at liberty to interfere; but I apprehend, if they had not decided that the action was not maintainable, they would not have interfered upon that ground.

I think that it is shewn that the plaintiff sustained damages, which were the natural and reasonable result of the defendant's wrongful act, and that he is therefore entitled to retain the verdict in his favour.

The appeal should be allowed, in my opinion, and the rule to set aside the verdict and enter a nonsuit discharged, with costs.

PATTERSON and MORRISON, JJ. A., concurred.

Appeal allowed.

JENKS ET AL. V. DORAN.

Promissory note—Indorsement by payee after insolvency.

The payee of a promissory note made and payable in Ontario, who had absconded to Michigan, while there and after a writ of attachment in insolvency had issued against him in Ontario, endorsed the note for good consideration to the plaintiffs, who took it. *bona fide*.

Evidence was given to prove that by the law of Michigan the indorsement was sufficient to pass the note to the plaintiffs.

Held, reversing the judgment of the County Court, that the plaintiffs could not recover, as the title to the note had vested in the assignee before the indorsement, and that his rights thereto could not be affected by the law of Michigan.

APPEAL from the County Court of the County of Wellington.

This was an action by the plaintiffs, as indorsees of a promissory note made by the defendant, payable to one Alfred Anstee or order, and endorsed by Anstee to the plaintiffs.

It was shewn at the trial, by admission or by the evidence of witnesses, that Anstee had lived in the county of Wellington, and that the note in question was made there on 1st April, 1879, and fell due at six months, or on 4th October, 1879. About the end of August, 1879, Anstee, who was in debt, absconded and went to Michigan having the note with him. On 4th September, 1879, a writ of attachment in insolvency issued against him in the county of Wellington, and on 16th October following, John Smith was appointed assignee of his estate and effects in the insolvency proceedings.

An expert in the law of the state of Michigan gave evidence to prove that the property in the note, if in Michigan, would not pass to an assignee in bankruptcy in a foreign country, and that the payee and the note being in Michigan, and the insolvency proceedings in Canada, endorsement of the note in Michigan would pass the note to the indorsee.

The learned Junior Judge, who tried the case without a jury, found that the plaintiffs took the note sued on from the

payee, to whose order it was made payable, for consideration and *bona fide*; but it was admitted that the indorsement was made by the payee after he had been placed in insolvency, and when the title to it had passed to his assignee. The learned Judge, after consideration, delivered the following judgment:

This is an action on a promissory note made by defendant to one Anstee, who before maturity, but after the issue of a writ of attachment in insolvency, transferred the note to the plaintiffs, the note never having been in possession of the assignee. Of course it is material that the plaintiffs should have taken the note *bona fide* for value and without notice of any defect in the title, all of which facts I find upon the evidence to be clearly in their favour.

It is, in my opinion, unnecessary to consider what effect the laws of a foreign state may have upon the case.

The defendants contend that the proceedings in insolvency vest in the assignee all the property of the insolvent, including negotiable instruments. This undoubtedly is true, so far as it goes, but a negotiable instrument is of so peculiar a character that it is distinguishable from other chattels, and possession and delivery are important to perfect a title.

This doctrine has been adopted in numerous cases and repeatedly laid down. In *Wookey v. Poole*, 4 B. & Ald. 1, for instance, Bailey, J., says: "The holder *bona fide* and for valuable consideration of a bank note or bill of exchange has a good title against all the world, because in the case of bank notes they are considered money and pass as such, and it is essential for the purposes of trade that *delivery* should give a perfect title, and because in the case of bills of exchange this is the law and custom of merchants."

Upon this doctrine it has been held that stolen notes or notes acquired by fraud can be transferred to a *bona fide* holder without notice so as to give him a perfect title. See *Raphael v. Bank of England*, 17 C. B. 161, and cases there referred to.

Now if a thief can confer a good title, how can it be contended that one in a better position can not? The effect of the Insolvent Act cannot strengthen the position of the assignee beyond that of any other person in whom a note may be vested. Even supposing it had come into possession of the assignee and afterwards by theft into the hands of a person who transferred it, can there be any difference? Is the assignee a holder of a different kind from any other? Certainly not. There is no charm in the word assignee, and no stronger or greater force by the transfer by operation of the statute than if a similar transfer were

made by deed *inter partes*. I think there can be no doubt that the plaintiffs acquired a good title to the note in this case and are entitled to recover against the maker.

It is in evidence that the maker paid the note to the assignee, but in doing so he paid the note to one whose title was not perfect for want of possession, of course doing so at his own risk of the note coming up in other hands, against which he has secured himself by indemnity from the assignee.

It is perhaps proper that I should state that I see no grounds to doubt the *bona fides* of the plaintiff. He did not run great risk in taking the note as it was taken for land for which he did not give a deed. Also, Anstee was introduced to him by a person whom he knew and relied upon, and the impression I formed from the conduct and appearance of Mr. Jenks in the box was entirely in his favour.

My judgment will therefore be for the plaintiffs.

The defendant afterwards moved for a rule *nisi*, to set aside the verdict, which was refused.

The defendant appealed.

The case was argued on the 9th September, 1880 (a).

Boyd, Q.C., for the appellant. Under section 16 of the Insolvent Act of 1875, the note sued upon became vested, by virtue of the writ of attachment and proceedings thereunder, in the assignee, who was the only person who could endorse such note, and the alleged endorstation of Anstee, being after the writ of attachment had issued, and without the consent of the assignee, could convey no title to the plaintiffs. The cases referred to by the learned Judge of the County Court are cases where delivery was a sufficient transfer, and do not apply to an instrument such as the present where an endorsement by the payee is necessary to a perfect transfer, and where, as in this case, the writ of attachment vested all the rights of the insolvent, including the right to transfer, in the assignee; nor is the instance of the stolen note put by the learned Judge at all analogous, since no title in the note declared upon, if it had been stolen, could pass, as an endorsement in writing was necessary to perfect the transfer. The contract of the appellant was made entirely in Canada, and their contract was to pay to an order

(a) *Present*.—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

valid by the law of Canada, the *lex fori*, which in this case is also the *lex contractus*, and must govern. No satisfactory evidence was given as to the law of Michigan. He cited *Arden v. Watkins*, 3 East 317; *Thomason v. Frere*, 10 East v. 418; *Turquand v. Vanderplank*, 10 M. & W. 180; *Ashurst Bank of Australia*, 4 W. R. 171; *Roe v. Royal Canadian Bank*, 19 C. P. 247, 20 C. P. 351; *McDonald v. Georgian Bay Lumber Co.* 24 Gr. 356; *Smith v. Chandler*, 3 Gray 392; *Lebel v. Tuckett*, L. R. 3 Q. B. 77; *Cloyes v. Chapman*, 27 C. P. 22; *Perkins v. Beckett*, 29 C. P. 395; *Story's Conflict of Laws*, sec. 420, 7th ed.; *Willis v. Freeman*, 12 East. 656; *Smith v. De Witts*, 6 D. & R. 120; *Smith v. Marsack*, 6 C. B. 486; *Parsons on Promissory Notes*, p. 153; *Story on Promissory Notes*, 7th ed., secs. 102, 103, 122, 123.

Ferguson, Q.C., and *W. Macdonald*, for the respondents. Having given value for the note and taken it without any notice of the defect, the respondents acquired a good title to the note, and are entitled to recover against the makers. If one who has stolen a note can confer a good title, as the authorities prove, it cannot be held that a title to a note cannot be acquired from an insolvent by one who takes it in good faith, and in ignorance of the insolvency.

It was shewn by an expert at the trial, that the note being in Michigan when the writ of attachment issued would not be affected by it, and that as the payee was there at the time of the endorsement, by the laws of that state the plaintiffs obtained a valid title to the note. Such being the case, they are clearly entitled to succeed in an action thereon in our Courts. They cited *Harvey v. Turner*, 6 Ex. 656; *Daniel on Negotiable Instruments*, 2nd ed. 675; *Parkyn v. Moon*, 7 C. & P. 408; *Cross v. Currie*, 5 App. R. 31; *Story's Conflict of Laws*, sec. 417; *Roe v. Smith*, 15 Gr. 344; *Culver v. Benedict*, 13 Gray 7; *Hunter v. Potts*, 4 T. R. 182; *Simpson v. Fogo*, 9 Jur. N. S. 403, *Ogden v. Saunders*, 12 Wheat. 213; *Wallace v. Hardacre*, 1 Camp. N. P. 45.

September 25, 1880. BURTON, J. A.—The law is as the learned Judge has laid it down, in the case of negotiable instruments ; when they are once *in due course of circulation*, they then resemble cash, and persons, whether they have a property in them or not—if they appear to have it—can make a valid transfer of them to an innocent party. The fallacy of his reasoning is in treating this note as in course of circulation ; and not being in due course of circulation, it loses the protection which otherwise arises in favour of an indorsee.

The general rule of the Common Law is, that except by a sale in market overt no one can give a better title to personal property than he has himself.

At an early date an exception was established in the case of bank bills, upon principles of commercial policy, and especially on the ground that bank notes pass from hand to hand like coin. This same principle was extended to bills and promissory notes, in *Grant v. Vaughan*, 3 Burr. 1516. And in *Peacock v. Rhodes*, 2 Doug. 633, the same learned Judge, who decided the previous cases, laid down again broadly the rule that there was no distinction between bank notes and any other commercial paper ; and in *Goodman v. Simonds*, 20 How. 343, the following propositions are affirmed, viz., that the possession of such paper carries the title with it to the holder ; and that the party who takes it for value, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world.

At the time of the insolvency this note had not been put in circulation, and when the insolvency intervened the payee's right to pass the property by indorsement ceased. The plaintiff has to make title through that indorsement, and as the payee had no authority to make it, he necessarily fails.

It may at first sight appear to be somewhat incongruous that a party taking a note from a thief may be entitled to recover, and that this plaintiff should fail ; but the incongruity will be found to be apparent rather than real. If the

note in this case had been stolen from the payee or his assignee before indorsement, the party taking it from the thief could not have recovered, because it was not in a condition to pass from hand to hand by delivery ; if, on the other hand, it had been indorsed in blank and stolen in that condition, the *bona fide transferee* from any party appearing to be the holder, would be entitled to recover—because by leaving it in that state, he virtually indorsed to the ultimate *bona fide* holder, whose right could not be affected but by notice.

We have nothing to do with the law of the State of Michigan, which cannot affect the rights of the assignee, or the liability of the defendant upon this note, which was made and was payable in Ontario, and was part of the assets of the insolvent at the time of his insolvency, and vested in his assignee. The title thus acquired in the case of negotiable paper payable to bearer, and of which the assignee fails to acquire the actual possession, is liable to be defeated by a transfer and delivery to a *bona fide* purchaser, but in a case like the present his indorsement was requisite to transfer the property.

I am of opinion, therefore, that the judgment was erroneous, and should be reversed ; and that a rule should have issued, and should be now made absolute, to set aside the verdict and enter it for the defendant, with costs.

PATTERSON, J. A.—It was shewn at the trial, by admission or by the evidence of witnesses, that Anstee had lived in the county of Wellington, and that the note in question was made there on 1st April, 1879, and fell due at six months, or on 4th October, 1879. About the end of August, 1879, Anstee, who was in debt, absconded and went to Michigan, having the note with him. On the 4th September, 1879, a writ of attachment in insolvency issued against him in the county of Wellington, and on 16th October following John Smith was appointed assignee of his estate and effects in the insolvency proceedings. This is a rather bald statement of the proceedings in insolvency,

containing no information of anything done upon the writ before the 16th October. I find a somewhat fuller statement in a special plea which contains the allegation that the writ was addressed to one David Simpson, an official assignee. No question has been made before us, either in argument or by the formal notice given of reasons against the appeal, of the insufficiency of the proof of the insolvency proceedings. On the contrary, the argument has proceeded on the assumption that the attachment was operative from its date, or at all events from some time before the 1st of October; and it is apparent, from the absence of reference to the subject in the judgment of the learned Judge of the County Court, that there was no dispute about it. For our purposes, therefore, we must take the fact to be, that there were valid proceedings in insolvency prosecuted from the time of the issue of the writ.

Then we learn from the evidence and from the judgment delivered, that Anstee went to one of the plaintiffs in Michigan, and bargained with him for the purchase from the plaintiffs of some land in that State, for the price of \$1,280, taking a written agreement for the sale of the land, and paying \$1,200 of the price by indorsing to the plaintiffs several promissory notes, one of which was that now in question. The plaintiffs took the note innocently, and without any notice of the insolvency proceedings. It was delivered to them on the 1st day of October. It does not appear when Anstee wrote his name on the note, as the plaintiff who received it from him did not see him write his name—the name being already written when the note was produced to him.

The principal question argued before us was, the validity of the indorsement, under these circumstances, to transfer the property in the note to the plaintiffs.

The judgment delivered in the Court below is occupied with the same question. The learned Judge there arrived at the conclusion that although the proceedings in insolvency would vest in the assignee all the property of the insolvent, including negotiable instruments, yet the prin-

ciple which governs the decision of such cases as *Wookey v. Pole*, 4 B. & Al. 1, and *Raphael v. The Bank of England*, 17 C. B. 161, would protect the plaintiffs, who took this negotiable instrument from the person named in it as payee, without notice of any defect in his title, and in good faith. He puts the plaintiffs' right upon the same footing as that which may be acquired by a *bona fide* purchaser of a stolen bill or note which has been put into circulation by the thief. The doctrine which the learned Judge had in his mind was, doubtless, that which was well enunciated by Williams, J., in delivering the judgment of the Court in *Ingham v. Primrose*, 7 C. B. N. S. 82, when he said, at p. 85 : " It is, we think, settled law, that if the defendant had drawn a check, and before he had issued it he had lost it, or it had been stolen from him, and it had afterwards found its way into the hands of a holder for value without notice, who had sued the defendant upon it, he would have had no answer to the action. So, if he had indorsed in blank a bill payable to his order, and it had been lost or stolen before he delivered it to any one as indorsee. The reason is, that such negotiable instruments have, by the law merchant, become part of the mercantile currency of the country, and in order that this may not be impeded, it is requisite that innocent holders for value should have a right to enforce payment of them against those who, by making them, have caused them to be part of such currency."

In the case of *Wookey v. Pole*, cited by the learned Judge, the question was the title to an exchequer bill, which passed by mere delivery, like a check payable to bearer, or a bill indorsed in blank ; and the instrument in controversy in *Raphael v. The Bank of England* was a bank note payable to bearer. The attention of the learned Judge does not appear to have been directed to the distinction between such instruments as these, and those which the indorsee takes directly from the indorser, upon whose title he has therefore to rely. There is a passage in the judgment of Best, J., in *Wookey v. Pole*, in which this dis-

inction is pointed out. Speaking of exchequer bills, he says, at p. 8 of the report: "But the great point is, that they are not like goods taken on the credit of the person from whom you receive them, but on that of the government. The receiver never inquires from whom they come further than to satisfy himself that they are genuine bills."

But the more direct authorities which have been cited to us, do not seem to have been alluded to in the Court below. I infer this from the absence of any reference to them by the learned Judge, and from the fact that they have not found a place in the list of cases appended to the printed grounds of appeal.

In *Arden v. Watkins*, 3 East 317, the defendant had accepted a bill for the accommodation of one Jones, a trader, who indorsed it for value to the plaintiff, who received it in ignorance of the fact that Jones had committed an act of bankruptcy. The defendant contested his liability to the plaintiff upon grounds similar to those relied on by the defendant before us, and the contest turned, not on any dispute as to the general doctrine that the property in a bill payable to the bankrupt would vest in his assignee, even as against an innocent indorsee of the bankrupt, but on the question whether the acceptance was, under all the circumstances, without consideration. The decision was, that there was no consideration, and that as the bankrupt could not have enforced payment of it, he had no such property in it as would pass to his assignee; and upon that ground the plaintiff recovered.

The later case of *Willis v. Freeman*, 12 East 656, differed from *Arden v. Watkins*, principally in the fact that the bill which was indorsed by the bankrupt was partly accommodation, and partly for value. The indorsee was held, upon the authority of *Arden v. Watkins*, to be entitled to recover upon it to the extent to which it was an accommodation acceptance, but to that extent only. The law was thus stated by Lord Ellenborough at p. 659: "It may be considered as clear that, except in cases provided for by particular statutes, a trader

who has committed an act of bankruptcy, upon which a commission afterwards issues, can make no transfer of his property to the prejudice of his assignees, nor do any act to interfere with their rights; but every such attempted transfer or act is liable to be vacated by his assignees. On the other hand, when it does not affect the rights and interests of the assignees, the act of a man who has committed an act of bankruptcy has the same effect as the act of any other person. The question, therefore, for consideration here is, whether this indorsement by Anderson, if allowed to be effectual, could prejudice his assignees or interfere with their rights; because as far forth as it would do so, it is inoperative."

In *Smith v. DeWits*, 6 D. & R. 120, we have again facts a good deal like those in *Arden v. Watkins*, but the plaintiff Smith was met by an additional difficulty from other facts which were held to show that he was not a *bona fide* holder. The case is useful to us at present, chiefly for the expressions of Abbott, C. J., and Holroyd, J. The former said at p. 121: "It cannot be denied that if the bill was accepted for value, the plaintiff could never have recovered upon it, because Crozar being at that time a bankrupt, it would have passed to his assignees." And the latter at p. 122: "Assuming that the assignees might have recovered, it is clear that the plaintiff had no title, because at that time the property in the bill, if Crozar had any, vested in the assignees."

We have looked at the numerous other cases and the passages in the various text books to which our attention was directed through the industry of the counsel who argued the appeal, and have not confined our researches to those references; and while we agree with the learned Judge that the rule of decision will apply equally to a note held by the undischarged bankrupt and to a lost or stolen note, we are unable to find any support for the contention that in the case of a bill or note which an indorsee takes by direct indorsement from a prior party, whose title has become vested in his assignees in bankruptcy or insolvency,

any title passes to the indorsee. His payment of full value, or his good faith in the transaction, or his ignorance of the defect in his indorser's title, will not avail to protect him, as he can take only the title which the man he deals with has to give. The transaction which is protected is of the other class, in which an instrument being originally payable to bearer, or indorsed in blank and so made in effect payable to bearer, reaches, in the course of its circulation, the hands of an innocent holder. The feature emphasized as essential, is the capacity of the instrument to pass by delivery only: *Byles on Bills*, 12th ed. 372. When a bill or note indorsed in blank is put on the same footing as a check or note payable to bearer, I understand the reference to be to the case of a person who takes the instrument, as he would one payable to bearer, from one who is himself the bearer only, and not the indorser. I apprehend that inasmuch as he has to make title through the indorser, under the legal effect of the indorsement which he may treat as an indorsement to himself, he may find his title affected by the infirmity of that of the indorser, although he may be excused from inquiring into that of the person with whom he immediately deals. It is not, however, necessary at present to hazard a very decided opinion on this point.

If the considerations and authorities to which I have adverted had been presented to the learned Judge, whose care and industry have been apparent in more than one judgment which we have had occasion to review, we do not doubt that he would have been led to a different conclusion.

One branch of the plaintiffs' opposition to the defence which I have so far been discussing, was the contention that, as the note was indorsed to them in the State of Michigan, their title to it cannot be affected by the bankruptcy law of the Dominion.

In support of this contention, evidence was given by an expert in the laws of Michigan to prove that in the Courts of that State the property in the note in question would

be held to have passed by the indorsement to the plaintiffs, the note and the payee having both been in Michigan at the time of the indorsement, no effect being allowed to the bankruptcy law of a foreign country ; in other words, that the note would be held to have continued to be the property of the insolvent.

We are without any finding by the learned Judge who tried the case upon the question of fact, what is the law of Michigan. He treats it as unnecessary to be discussed, perhaps because his judgment was in the plaintiffs' favour on other grounds. If the question had now to be decided, I do not think one could venture to pronounce upon it at all definitely without more evidence than we have. The witness certainly states clearly enough that compulsory bankruptcy proceedings in a foreign country would not affect property in Michigan, according to the law there ; and I have no doubt this is a perfectly true statement of the law. But it leaves the question open, was this note property in Michigan ? It was evidence of a contract made in Canada and to be performed in Canada. The debtor was domiciled in Canada and so was the payee, who happened, so far as the evidence shows, to be temporarily on the Michigan side of the Detroit river.

The other evidence of the expert, or most of it, does not strike me as evidence of the foreign law, but rather as a legal opinion upon the facts of this case as they appeared to his apprehension at the moment, as *e. g.*, when he says : "The dealings between the plaintiffs and Anstee, as related by last witness, would be sufficient to vest the property in plaintiffs, notwithstanding insolvency proceedings here."

If I correctly gather the opinion of the witness, it is, that, as the bankrupt laws of a foreign jurisdiction are not recognized, the operation of the law of the Dominion, which is to transfer to the assignee all the property of the insolvent in the Dominion (assuming that to be its limit,) and under which the right to payment of the money secured by the note in question would pass to the assignee, were so far evaded by the insolvent crossing the ferry

to Port Huron with the paper on which the promise was written in his pocket, that both the debt and the evidence of it remained, as against the assignee, the property of the insolvent. His opinion must go this length, otherwise the insolvent ceased to own the debt on or about the 4th September, and therefore could not transfer it to the plaintiffs on the 1st October. The question turns upon the position and ownership of the property on the 1st October. No opinion is asked or given upon the effect of the good faith of the plaintiffs in taking the note as they did, from one who was apparently its owner. It is not suggested that on that subject there is any conflict of law; and we cannot doubt that under the foreign law, as under our own, the plaintiffs would have to rely upon the title of their indorser. His title was, therefore, the great point; and I certainly cannot find that, either upon the law of Michigan, as explained to the extent to which this evidence explains it, or upon our domestic law, the result which I have deduced under the first branch of our inquiry has been shaken.

We have further to bear in mind that this is the *locus fori* as well as the *locus contractus*, and that even if rights such as the plaintiffs contend for should be recognized in the Courts of Michigan, there is no principle of comity which demands their recognition here. I do not think it necessary to refer particularly for authority to any source but *Story's Treatise on the Conflict of Laws*, in the eighth chapter of which there is much valuable learning collected upon the general subject, and much instructive disquisition upon the rules of public law affecting it, as they have been applied in the tribunals of the different States of the Union and of European countries, or propounded by writers of authority.

I agree that we must allow this appeal, with costs, and direct that the rule be made absolute to enter a verdict for the defendant.

MOSS, C. J. A., and MORRISON, J. A., concurred.

Appeal allowed.

COLBERT V. HICKS.

Malicious arrest—Reasonable and probable cause—Variance.

The declaration alleged that the defendant laid an information that certain harness had been stolen by the plaintiff, whereas the information proved was qualified by the addition of the words "as he supposed."

Held, affirming the judgment of the County Court, no variance.

It was shown that the information was laid by the defendant on the advice of the magistrate, and that he did not interfere in the issue of the warrant for the plaintiff's arrest, but it was proved that the information contained the substance of the statements made by the defendant, which justified the warrant.

Held, there being an absence of reasonable and probable cause, that the defendant was liable.

APPEAL from the judgment of the County Court of Huron.

The declaration charged that the defendant falsely and maliciously, and without any reasonable or probable cause, made a complaint before a Justice of the Peace, that a set of double harness belonging to him had been stolen by the plaintiff, and that he had just and reasonable cause to suspect and did suspect that they were then concealed on the premises of one James Colbert, the father of the plaintiff, and he procured the Justice to issue his warrant for searching the premises, and for apprehending the plaintiff, under which warrant he was brought before the Justice, who, having heard the charge, discharged the plaintiff out of custody

There was another count in trespass for giving the plaintiff into custody of a constable, and causing his imprisonment.

The case was tried before the Judge of the County Court of Huron and a jury, when the plaintiff obtained a verdict and \$50 damages. Subsequently a rule *nisi* to set aside the verdict, and to enter a nonsuit, or a verdict for the defendant, was discharged.

The defendant appealed.

The appeal was argued on the 13th September, 1880 (*a*).

(*a*) *Present*—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

T. Ferguson, Q.C., for the appellant, cited *Davis v. Noake*, 6 M. & S. 29; *Barbour v. Gettings*, 26 U. C. R. 544; *Rice v. Saunders*, 26 C. P. 27; *Munro v. Abbott*, 39 U. C. R. 79; *Gregory v. Derby*, 8 C. & P. 749.

H. Becher, for the respondent.

The arguments are sufficiently stated in the judgment.

September 25, 1880. Moss, C. J. A., delivered the judgment of the Court.

The defendant complains of a verdict for \$50, which has been upheld by the learned Judge of the County Court of Huron. It cannot be argued with any appearance of plausibility that the amount recovered is so large as to induce the Court to interfere. Accordingly, the substantial question for our consideration is, whether the evidence discloses a cause of action. The declaration consists of two counts, one of which is trespass to the person, in giving the plaintiff into the custody of a constable and causing his imprisonment. If this were the sole grievance to the plaintiff, he would probably be defeated by the evidence of the magistrate and constable, which proved in effect that the defendant's share in the actual arrest of the plaintiff went no further than laying the information forming the foundation of the proceedings.

But the other count charges that the defendant falsely and maliciously, and without reasonable or probable cause, laid an information before a justice of the peace that a set of double harness belonging to him had been stolen by the plaintiff, and that he had just and reasonable cause to suspect, and did suspect that they were then concealed on the premises of one James Colbert, and he thereupon procured the magistrate to issue his warrant for searching the premises, and for apprehending the plaintiff, and bringing him before the justice.

The information which was proved stated that the harness was feloniously stolen from the defendant's premises by, *as he supposed*, the plaintiff, and that he suspected them to be concealed on the premises of James

Colbert. The first objection taken to the plaintiff's recovery is that there is a variance, the declaration charging that the deposition was, that the harness had been stolen by the plaintiff, whereas such statement was qualified by the addition of the words, "as he supposed." If this point were well taken we would have remitted the case to the Court below in order that the requisite amendment might be made, rather than permit the plaintiff to be defeated by such a technical objection; but the case of *Davis v. Noake*, 6 M. & S. 29, is satisfactory authority against its sufficiency. There, as here, the declaration averred a charge against the plaintiff of having feloniously stolen certain articles. In the information it appeared the defendant had only deposed that he suspected and believed, and had good reason to suspect and believe, that they had been stolen by the plaintiff. The objection of a variance having been taken and overruled at the trial, a rule *nisi* for a new trial was, after argument, discharged. Lord Ellenborough remarked, in language very apposite, at p. 30: "True it is, that there was not any direct allegation on oath that the plaintiff had committed felony; nor could it have been so alleged with propriety, unless the defendant had actually seen the felony committed, or had been present at the confession of it. But, nevertheless, it amounts to a charge of felony. * * No person under the same circumstances in which the defendant stood, could swear more positively to the charge; and yet we are called upon to say that this is not a charge imputing felony to the plaintiff, and inducing the magistrate to act thereon. It appears to me that there is not any variance." Still closer is the application of the language of Abbott, J., who said at p. 32: "The evidence is, that an information was laid before a magistrate containing in substance that a felony had been committed, and that the informant had good reason to *suspect* the plaintiff of having committed it." This case is a conclusive authority that even in the days when very small slips of the pleader were treated as fatal variances, this case would have passed unscathed.

It was next urged that the defendant was protected, because the magistrate swore that the defendant partially asked him for his advice as to his best course, and he said that, under the circumstances, he could do nothing but issue a search warrant, and that it was upon his advice the information was laid by the defendant, who did not interfere in the issue of the warrant. The magistrate, however, also proved that the information contained the substance of the statement which the defendant made. I think it is settled law that upon this state of facts the defendant was liable, unless he succeeded in showing that he had reasonable and probable cause for his accusation. He had in truth taken the responsibility of setting the law in motion. He had charged the plaintiff upon oath with having stolen his property. This statement he cannot now be allowed to repudiate or to fasten upon the magistrate. To whatever extent the latter may have assumed to advise him, it is abundantly clear that the warrant was justified by the information, and that the arrest was the direct consequence. This view of the law is plainly supported by *Wyatt v. White*, 5 H. & N. 371, where the defendant's application for a search warrant was held to involve an application for arrest, and it was pointedly said at p. 378: "The question is, therefore, reduced to this—was there an absence of reasonable and probable cause for laying the information; for that was the act of the defendant, and what afterwards took place was consequent upon it?"

We are of opinion that the facts of this case absolutely excluded the idea of reasonable and probable cause for laying the information. The defendant's sole ground for preferring this serious charge against his neighbour was, that he saw attached to a set of single harness a tug which was, or which he believed to be, a portion of the double harness stolen from him many months before. It appeared that the plaintiff, who was a man of unblemished character, had long before this offered to sell him the set of single harness, which he did not then desire to purchase, but afterwards thinking that it might

suit him he asked to see the set, when he discovered, as he alleged, his own tug. There is abundant room for thinking it possible that the tug was not his property, and there are other circumstances, into a minute detail of which it is unnecessary to enter, placing his conduct in making such a charge upon the grounds open to him in an unfavourable light. It is quite out of the question to suppose that the Judge could have withdrawn this question from the consideration of the jury; and in our opinion they were amply justified in finding against the defendant.

We have attentively considered the alleged grounds of misdirection, and none of them appear to us to be well founded. They involve not propositions of law authoritatively laid down for the direction of the jury, but reasonings or reflections upon the facts. In the aggregate these were probably as fair to the defendant as to the plaintiff, and at any rate they are no more than the expression of the manner in which the facts presented themselves to the mind of the Judge. I am inclined to think that without any impropriety he might have characterized the defendant's action in stronger terms. I am clear that against the charge there is no legal ground of complaint.

In my judgment the defendant, instead of quarrelling with the verdict, should have congratulated himself on his easy escape.

The appeal must be dismissed, with costs.

Appeal dismissed.

DOMINION LOAN SOCIETY V. DARLING.

Mortgage—Rectification—Evidence.

The plaintiffs sought a rectification of the description of the premises covered by a mortgage to them, by including therein the water lots and dock property in front of the lots described in the mortgage. The plaintiffs relied on parol testimony, while the documentary evidence was all in favour of the defendant.

Held, affirming the decree of Spragge, C., 27 Gr. 68, that no case was made for a reformation of the mortgage.

THIS was an appeal by the plaintiffs from a decree of Spragge, C., dismissing their bill, reported 27 Gr. 68, where the pleadings and facts are stated.

The bill was filed by the plaintiffs against the assignee in insolvency of the mortgagors, to rectify a mortgage. The rectification sought was that of the description of the premises covered by a freehold mortgage, executed to the plaintiffs by John Dougall and Francis J. Dougall, the insolvents, of whom the defendant was the assignee. The actual description was lots Nos. 6 and 7, on the west side of Sandwich street, in Windsor, according to a certain plan, except five feet in front by the depth of the lot, sold to one Pulford, "the part intended to be included herein having a frontage on Sandwich street of 73 feet by a depth on Ferry street of 85 feet." The mortgaged parcel was also stated to contain "by admeasurement 6,205 square feet," being the exact number included within the given boundaries. The plaintiffs' allegation was, that the water lots and dock property in front were intended to be included. It appeared from the plan that between the property thus described and the Detroit River there was a street called Bordage road; and it was what might be termed the continuation of lots 6 and 7 to the south of this street, and between it and the river, that the plaintiffs claimed. This continuation was owned by the Dougalls.

The appeal was argued on the 14th September, 1880. (a)

Meredith, Q.C., for the appellants. The description in the mortgage covers the water lots and dock property. At any rate the evidence shews that it was the intention of the parties to include this land, and that its omission was due to a mutual mistake. It is submitted that if this be not the case, then a fraud was committed by the insolvents, and the defendant, as their assignee, is not entitled to any greater rights than they would have had. He cited *McKay v. McKay*, 31 C. P. 1.

Ferguson, Q.C., for the respondent. There is no evidence of fraud by the insolvents, and in their bill the appellants do not seek relief on that ground, but only on that of mutual mistake. If, as contended by the appellants, the water lots and dock property are included in the mortgage, no reformation is necessary, but it is shewn by the evidence that the property sought to be included formed no part of lots 6 and 7, and that the mortgagors did not intend that it should be included. Under these circumstances there can be no rectification, as the authorities shew that it must be proved by irrefragable evidence that the instrument was executed under a common mistake. He referred to *Bloomer v. Shettle*, L. R. 13 Eq. 427; *Fowler v. Fowler*, 4 DeG. & J. 265.

September 25, 1880. Moss, C. J. A., delivered the judgment of the Court.

It cannot be disputed that the learned Chancellor correctly laid down the rule of the Court with regard to the degree of proof required for the rectification of a written instrument. The proof must be clear, satisfactory, and conclusive. In the language of the Chancellor, at p. 73: "The evidence required for that purpose is something more than a mere preponderance of testimony." It must be demonstrated what the true terms of the bargain were, and that by mutual mistake these are not incorporated in the writing. In my opinion there is no more doubt that the rule has been correctly applied. Mr. Meredith's able argument made me desire to give further consideration to the case, but a careful exam-

ination of the whole evidence has convinced me that it cannot prevail. Even if we felt a strong suspicion that the defendants expected and intended to obtain the land in question as part of their security, suspicion alone would not form the basis of judicial action. The negotiations on the part of the mortgagors were conducted by John Dougall, who denies that the agreement was to include this parcel. Although that denial is by no means conclusive, it adds seriously to the plaintiffs' difficulties. The Chancellor, however, while giving him credit for an intention to speak truthfully, thinks that the parol evidence preponderates on the part of the plaintiffs. We have no desire to combat this view, while we think that, if necessary, there would be much reason for concluding that it puts the plaintiffs' position in a somewhat too favourable light. We are especially impressed with the fact that Mr. Peters, one of the Directors of the Company, who personally visited these premises with the view of reporting upon their value, is himself a skilful land surveyor. If the mortgaged premises were to extend to the river, a distance of upwards of 200 feet in depth, as now contended, it seems inconceivable that he should have supposed the whole parcel was described by boundaries which only gave 85 feet in the direction of the river. But however that may be, we agree with the learned Chancellor that the writings interposed insuperable obstacles, at least unless parol evidence of far greater cogency could be adduced. A written application for the loan was made in concert with the plaintiffs' local agent, who was well acquainted with the property. The description in it is 73 feet on Sandwich street by 85 depth on Ferry street. Then there is the certificate of valuation made by Mr. Peters, and giving the same description. It is vain to oppose to these a contradicted statement of the officers of the company, that the disputed parcel was pointed out as a part of the premises to be covered by the mortgage. We have not overlooked the fact that the Bordage road seems to have been but little used, and that an observer might easily

suppose that the whole formed one property. But this is very far from removing either the difficulty occasioned by the great difference between the depth certified by Peters and the 200 feet to the river, or the other objection to reformation already referred to and dwelt upon more fully by the Chancellor. It may be noted that the general, although perhaps not the universal, practice in making conveyances of this and the adjacent property was to describe the disputed parcels as the water-lots in front. It is conceded that even in the conveyance to Pulford the front lot is described as a water-lot.

After weighing the arguments of the plaintiffs' counsel, we see no reason for dissenting from the conclusion of the learned Judge, that the case is a weak one, only supported at most by parol testimony, while the documentary evidence is all against it.

We think the appeal must be dismissed, with costs.

Appeal dismissed.

MCINTYRE V. THE NATIONAL INSURANCE COMPANY.

Insurance—Statutory conditions—Arbitration.

Held, affirming the judgment of the Q. B., 44 U. C. R. 501, following *Parsons v. Citizens Ins. Co.*, 4 App. R. 96, and *Parson v. Queen Ins. Co.*, *ib.* 103, that a policy issued by the defendants, whose head office was in Montreal, signed by their president there, and countersigned by their local agent in Ontario, where the insured property was situated, was without conditions, as the conditions endorsed thereon were not headed either "Statutory" or "Variations."

The condition by which the defendants sought to defeat the action provided that all disputes touching loss or damage, should, after proof thereof, be submitted to arbitrators to determine the amount, but not the liability, and that an action against the company should not be sustainable until after an award had been obtained fixing the amount, or unless such action should be commenced within twelve months after the loss; and the defendants covenanted, in the body of the policy, to pay the loss within sixty days after the loss should be ascertained and proved, in accordance with the terms of the policy.

It appeared that the assured had furnished the defendants with proof of the loss on the 5th of April, to which the defendants made no objection until the 11th June following, when they served a written request for an arbitration upon the assured, who refused to arbitrate, and the plaintiff, to whom the claim was assigned, brought this action.

Held, that even if the condition were available as a defence, it had not been broken, as in the absence of a request to arbitrate within the sixty days, the loss must be considered as "ascertained and proved," and the plaintiff, therefore, had a right of action on the expiration of that period.

APPEAL from the Court of Queen's Bench discharging a rule *nisi* to enter a verdict for the defendants on the first and second pleas, and making a rule absolute to enter a verdict for the plaintiff, reported 44 U. C. R. 501.

The action was brought to recover the amount payable under a fire policy effected by one George Forrest with the defendants upon his stock in trade. It was alleged in the declaration, that the goods were destroyed by fire during the currency of the policy; that Forrest duly proved the loss; and that after the fire Forrest assigned his claim to the plaintiff.

There were ten pleas pleaded. Two of these were struck out at the trial, and the others were disposed of in the plaintiff's favour, except the ninth plea setting up a condition requiring any differences to be referred to arbitra-

tion, and a refusal to refer, on which a verdict was entered for the defendants, with leave to the plaintiff to move to enter a verdict for \$1,532. The defendants had leave also to move upon the first and second pleas, which raised the question whether, under the Uniform Conditions Act, the policy was to be treated as one with or without conditions.

The pleadings and facts are fully set out in the report of the case in the Court below.

The Court of Queen's Bench held, following *Parsons v. Citizens Ins. Co.*, 4 App. R. 96 and *Parsons v. Queen Ins. Co.*, 4 App. R. 103, that the conditions of the policy not being in accordance with the statute headed either "Statutory" or "Variations", the policy was one without conditions, and the condition as to arbitration could, therefore, form no defence.

The case was argued on the 18th May, 1880 (a).

J. K. Kerr, Q. C. for the appellant. All that I can urge in this case has been already said in *Parsons v. Queen Ins. Co.*, 4 App. R. 103, and in *Johnston v. Western Ins. Co.*, 4 App. R. 281.

The Court requested *H. McMahon*, Q. C. for the respondent to confine his argument to the questions arising under the ninth plea.

H. McMahon, Q. C. No judgment was given upon this point in the Court below as from the view they took of the case, it was unnecessary. The appellants cannot defeat the action on the ground set up in this plea, as they did not demand an arbitration until after the right of action on the policy sued on had become absolute by the lapse of the sixty days allowed by the policy after the delivery of the proofs of loss for payment of the policy. If the company could demand an arbitration after so long a time had elapsed, they could delay asking for it until after twelve months had expired, when the claim would, under the policy, be completely barred.

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Kerr, Q. C. Under the condition pleaded either party could demand an arbitration, and having had notice that the Company would not recognize his claim in full, the insured should have demanded an arbitration: *McInnes v. Western Ass. Co.*, 30 U. C. R. 580.

September 7, 1880. PATTERSON, J. A.—Upon this appeal there is no room for discussion as to our duty to affirm the decision of the Court below, because the ninth plea relies on the violation of one of the conditions of the policy, and the policy is one which has to be read as containing no conditions binding upon the assured. The decisions of this Court upon the effect of the Act respecting Uniform Conditions have, since the argument of this appeal, been affirmed by the Supreme Court.

It has, however, been argued by Mr. McMahon, for the plaintiff, that even if the condition relied upon in the ninth plea were available to the defendants, it has not been broken, and I wish to say that I am decidedly of that opinion. The condition is the same which was in question in *Ulrich v. The National Insurance Co.*, 4 App. R. 84, and resembles also a condition which we had occasion to discuss in *Johnston v. The Western Insurance Co.*, 4 App. R. 284. But the point in *Ulrich's* case was not quite the same as that now raised, and therefore the particular words of the condition necessary at present to be considered do not appear in the report of that case. I extract the condition as it is printed upon the policy, not as it is pleaded in the ninth plea, which omits some parts of it. It reads as follows :

“In case differences shall arise touching any loss or damage, after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the company under this policy. It shall be optional with the company to repair, rebuild, or replace the property lost or damaged with other of like kind and quality, within a

reasonable time, giving notice of their intention so to do within thirty days after receipt of the proofs herein required ; and until such proofs, declarations and certificates are produced, and examinations and appraisals are permitted by the claimant, the loss shall not be payable. Nor shall any act of the company, except their written declaration, operate to waive the requirement of such proofs.

“ It is furthermore hereby provided and mutually agreed, that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be sustainable in any Court of Law or Chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months next ensuing after the loss shall occur ; and should any suit or action be commenced against this company, after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.”

The proofs of loss were furnished on 5th April. Nothing was done on the part of the defendants by way of objecting to those proofs or of requiring further information or evidence, for doing which ample provision is made by another condition, until 11th June, when a written request for an arbitration was served, with notice that the company had appointed an arbitrator. The plaintiff, or rather Forrest, took no steps to appoint an arbitrator on his part or to submit the matter to arbitration. The action was begun on 5th August. The absence of an award is pleaded in abatement.

The question is whether, under the terms of the condition coupled with another provision to which I have to refer, the request of 11th June, sixty-seven days after the proofs of loss were furnished, entitled the defendants to insist upon an arbitration and award as conditions precedent to the plaintiff's right of action.

In the body of the policy it is provided that the loss is “to be paid in sixty days after the proofs of the same, required by the company, shall have been made by the

assured, and received at this office, and the loss shall have been ascertained and proved in accordance with the terms and provisions of this policy, unless the property be replaced, or the company have given notice of their intention to rebuild or repair the damaged premises." The loss in this case was clearly payable, and the plaintiff's right of action for it had become complete under this covenant at the end of sixty days from the 5th of April, or seven days before the notice to arbitrate was given. I do not think it necessary to repeat what I said on this subject in *Ulrich's Case* and in *Johnston v. The Western Insurance Co.*, where I endeavoured to explain how, in my opinion, the words "ascertained and proved," &c., should be construed. The right of action, once vested, could not be divested by the notice to arbitrate. This consideration supplies a clear ground for reading the power to require an arbitration with the limitation confining its exercise to a reasonable time after the proofs are furnished. What that time should be I do not say, but it must be within sixty days, at farthest, from the time when the loss, in the absence of a request to arbitrate, would be taken as ascertained and proved. This view is enforced by noting the terms of the covenant I have just quoted, which make the money payable in the sixty days, *unless*—which necessarily means *unless within that time*—the company do one of two things, either replace the property, or give notice of intention to rebuild or repair it. If the property is replaced there is no further claim for money. If it is to be rebuilt or repaired, then, by the terms of the condition we are considering, that must be done in a reasonable time, and notice of the intention to do it must be given "within thirty days after the receipt of the proofs herein required."

To hold otherwise, respecting the notice to arbitrate, would put it in the power of the company, as was pointed out by Mr. McMahon, in some cases to put off the right of action until, by the lapse of twelve months from the time of the fire, it was barred for ever.

Upon the ground, therefore, that there has been no

breach of the condition, as well as upon the ground that the statute deprives these defendants of the right to assert the condition as against the plaintiff, I am of opinion that the appeal should be dismissed, with costs.

BURTON and MORRISON, J.J.A., and OSLER, J., concurred.

Appeal dismissed.

DOUGLASS V. THE GRAND TRUNK RAILWAY COMPANY.

Railway Co.—Obligation to fence—C. S. C. ch. 66.

The plaintiff sued the defendants for the loss of certain cattle which had escaped to their road by reason, as he alleged, of the neglect of the company to fence, and were killed by their train.

It appeared that the plaintiff owned land on either side of the defendants' railway, but the Toronto, Grey, and Bruce R. W., which lay to the north of defendants' railway, and had also been taken from his farm, ran between his land and defendants' railway.

Held, upon the facts stated below, that there was no evidence that the cattle had reached the railway from the south side; and the fact that the Toronto, Grey, and Bruce R. W. Co. had neglected to fence did not give the plaintiff, in respect of the occupation of their land by his cattle, the status of that company for the time, as adjoining proprietors, against whom only the defendants were bound to fence, so as to make the defendants liable.

APPEAL from the County Court of the County of York.

This was an action against the defendants, whereby the plaintiff sought to recover damages for certain animals which were killed by the defendants' locomotive.

The charge contained in the declaration was, that the plaintiff had cattle and pigs pasturing in land of his adjoining, the defendants' railway, and that by reason of the neglect of the defendants to maintain fences along their line, the cattle and pigs escaped from the plaintiff's land, got upon the railway, and were killed by engines or trains of the defendants.

The facts sufficiently appear in the judgment.

The case was argued on the 10th September, 1880 (a).

McMichael, Q.C., for the appellants. The learned Judge should have entered a nonsuit in this case, instead of directing a new trial. If the cattle went on to the railway from the north the defendants are not liable, as the plaintiff did not own the land adjoining the railway, and the authorities shew that the obligation to fence can only be invoked in favour of an adjoining proprietor: *McAlpine v. Grand Trunk R. W. Co.*, 38 U. C. R. 446. There was absolutely no evidence whatever to support the finding of the jury that the cattle came on the railway from the small piece of land lying to the south of the railway between the plank road and the railway. The only means by which the cattle could have reached this piece of land was by a steep and precipitous ascent. It is true that there was a possibility of their having climbed up this hill, but it is submitted that in the absence of any evidence that they did, such an improbability should not be assumed. All that was really proved by the evidence was, that the cattle had been killed, but that was not sufficient to entitle the respondent to a verdict: *Singleton v. Eastern, &c. R. W. Co.*, 7 C. B. N. S. 287; *Daniel v. Metropolitan R. W. Co.*, L. R. 3 C. P. 599. Besides, it was not even proved that the respondent owned this land. There was clearly contributory negligence.

Hagel, for the respondent. There is no appeal from the judgment of the Court below, as the granting of a new trial was a matter of discretion. [PATTERSON, J.A.—The provision in the statute restraining appeals on that ground does not apply to the County Court.] The evidence was amply sufficient to shew that the cattle reached the railway from either the north or south. Although the respondent's land on the north did not adjoin the appellants' railway, still, inasmuch as the Toronto, Grey, and Bruce Railway Co., who had omitted their duty to fence along the respondent's land, could not have treated his cattle as unlawfully

(a) *Pressnt.*—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

on their land, the case is brought within the decision of *McAlpine v. Grand Trunk R. W. Co.*, which shews that the respondent could clearly maintain an action against the defendants for loss of his cattle, if they got on to their track in that way. It is true that the hill leading up to the triangular piece of land on the south, referred to by the appellants, was difficult to ascend, but the cattle had frequently gone up and down it; and it is a fair inference from the evidence that they reached the track in that way. The respondent swore that he was the owner of this parcel of land.

September 13, 1880. PATTERSON, J. A.—The plaintiff was his own principal witness. His account of his cause of action is thus noted by the official reporter: "I am the plaintiff in this case. I live at Black Creek, near Weston, in the Township of York; the Grand Trunk Railway runs through my property; I own land on each side of the track; the Grand Trunk passes through my lot, No. 39, third concession from the bay. [Diagram is here produced, and explained to the jury by witness.] My dwelling is on the other side of the Weston road, and my stables are also there. On the 29th June, 1879, my cattle got on to the railway track as usual, and they happened to get killed that night; they were turned into the pasture field on the north side, and they got on to the railway; all the cattle got in, and there was a bull and a cow killed; the cow was worth about \$45 and the bull \$20; that was all they were worth; that was all I complain of on the 29th of June, 1879; there was no fence at all on either side; there was somewhere about 90 yards of fence down on the north side; there was somewhere about 60 feet that never was put up at all; there was once a fence on the south side, but it was taken away by the great flood, September 14th or 15th, 1878, pretty nearly a year before this accident; from that time it was never put up; there was always open about 60 feet; for about eleven months at all events."

He further stated that two pigs had been killed at two different times ; but he gave no definite account of how or from what part of his land they got on the railway.

Reading the plaintiff's statement that he owned land on both sides of the track, one would be naturally disposed to assume that he meant that his land adjoined the railway. That would be a mistaken idea, because the plaintiff showed on cross-examination that the Toronto, Grey, and Bruce railway, which lay to the north of the Grand Trunk railway, and had also been taken from his farm, intervened between his land and the Grand Trunk railway. His statement that he owned land on both sides of the Grand Trunk, while literally true, must, therefore, not be understood as an assertion that he was an adjoining proprietor on either side.

It will be observed that the plaintiff's evidence pointed altogether to the theory that the cattle had passed from the field at the north on to the railway ; and that that had happened because the field had not been fenced. No witness called by the plaintiff appears either to have said or to have been asked anything suggestive of any other explanation of the loss of which the plaintiff complained. That was evidently the theory on which the action was brought.

Counsel for the defendants moved at the close of the plaintiff's case for a nonsuit, upon the ground that, the plaintiff not being an adjoining proprietor, the defendants were not bound to fence as against his cattle ; and upon this, and another objection taken to the sufficiency of the evidence of the killing, leave was reserved to move to enter a verdict for the defendants, and the defendants called witnesses. There then ensued a struggle on the part of the plaintiff to make the defendants liable for default in fencing the south side of their line.

The locality of the accident was a little east of where the railways cross a stream called Black Creek. The two railways run here side by side, and cross the stream each upon its own bridge ; and there are embankments and cuttings, which were much discussed in the evidence and

illustrated by photographic views. A short distance east of the creek, the Weston Plank Road crosses the railways from the north to the south, and then runs parallel with and adjoining the south side of the Grand Trunk Railway, until it has almost reached the creek, when it diverges towards the south, leaving a small triangular piece of land bounded by the railway, the road and the creek. This little bit of land, which is said to be only forty feet wide, is claimed for the plaintiff as a part of his farm. Whether it is his or not would, if the case were to turn on its ownership, be a matter for inquiry, which, one can easily see, having regard to the facts, or what are said to be facts, that both the Weston Road and the Grand Trunk Railway existed before the plaintiff bought the farm, and that this triangle is not fenced off from the road or the creek, and has not been cultivated or occupied by the plaintiff, might involve a close reading of title deeds and careful application of certain doctrines of law. At the trial it was assumed by the Court to belong to the plaintiff. There had been a fence between it and the railway lands, but it had been washed away by a flood, and had not been replaced when the accident occurred.

The plaintiff had a farm crossing over the lands of both railway companies, his "right of way," as the witnesses call it, being under the bridges, and I believe near the creek, thus leading to the triangular bit of land, and so to the Weston Road, from which the southern portion of the farm and the plaintiff's dwelling-house and farm buildings were reached.

The Judge notes that he left it to the jury to say whether they could on the evidence say whether the cattle got in on the north or south. If on the south, then a verdict for the plaintiff. If on the north, or if they could not tell how they got in, then a verdict for the defendants.

The jury found that the cattle came from the north, through the right of way to the south, and entered on the track from the south between the abutments, and gave the plaintiff a verdict for \$69.

It is obvious that this verdict ignored the pigs, and we may therefore drop them from our further consideration.

A rule *nisi* was obtained on the part of the defendants to enter a verdict for them pursuant to leave reserved, or for a new trial on the law and evidence, and on affidavits.

The learned Judge, after argument of the rule, decided to make it absolute for a new trial on payment of costs by the defendants; and they appeal from his decision, contending that the plaintiff entirely failed to give any evidence sufficient to charge them.

If this had been an appeal from one of the Superior Courts in place of one from a County Court, Mr. Hagel's objection to it, as being from the granting of a new trial, which is a matter of discretion, would have been well taken; as on the authority of *Abbott v. Feary*, 6 H. & N., 113, we should be restrained, by the provision of the Act respecting the Court of Appeal, from entertaining the appeal, however well founded the appellants' demand for a nonsuit might appear to be. But our jurisdiction in respect of County Court appeals is not thus restricted. We are at liberty to consider the whole case, and if satisfied that the defendants should have succeeded at the trial, to give them the advantage of the leave reserved in their favor, as Mr. Justice Williams contended on very strong grounds in *Abbott v. Feary*, should have been done in that case.

The finding of the jury is, that the cattle got within the railway bounds from both directions; first, from the north, and then again from the south. If the defendants were responsible for their having had access from the north, the circumstance of their leaving the forbidden ground in safety, and then returning to it, would not exonerate the company. It is necessary, therefore, to consider the defendants' responsibility to the plaintiff for their neglect to fence at the north of their track.

The law, as contained in the Consol. Stats. of Canada, ch. 66, sec. 13, is that, "Fences shall be erected and maintained on each side of the railway, of the height

and strength of an ordinary division fence, with openings or gates, or bars therein at farm crossings of the road, for the use of the proprietors of lands adjoining the railway; and also cattle guards at all road crossings, suitable and sufficient to prevent cattle and animals from getting on the railway": sec. 15. "Until such fences and cattle guards are duly made, the company shall be liable for all damages which may be done by their trains or engines to cattle, horses, or other animals on the railway": sec. 16. "After the fences or guards have been duly made, and while they are duly maintained, no such liability shall accrue for any such damages, unless negligently or wilfully done."

It has been settled, by a long and uniform chain of decisions, that the cattle, for damage to which a railway company is liable under this law, are only those of the adjoining proprietor whose land has not been sufficiently fenced. It is now too late to raise the question whether the statute would not have borne a wider construction. Mr. Hagel has not attempted to do so; but he has argued that as the Toronto, Grey, and Bruce Railway Company, which is the proprietor adjoining the Grand Trunk Company, ought to have fenced along the plaintiff's land, and failed to perform that duty, it could not have treated the plaintiff's cattle as trespassers, or as being wrongfully on its land, and that for this reason the principle on which *McAlpine v. The Grand Trunk Railway Co.*, 38 U. C. R. 446, was decided, applies to give the plaintiff, in respect of the occupation of the land of the Toronto, Grey, and Bruce Company by his cattle, the status of that company for the time, as adjoining proprietor, and so to make the defendants liable.

In *McAlpine's Case*, the plaintiff's horse had a right to pasture in a field belonging to the proprietor of land adjoining the railway. By reason of a defect in the fence, the horse escaped into another field belonging to the same person, and thence through a defective fence on to the railway. The position is not similar to that assumed in this case. There is here no privity between the plaintiff and

the Toronto, Grey, and Bruce Railway Company, nor anything analogous to a tenancy of the owner of the horse to the owner of the field, as there was taken to be in *Mc-Alpine's Case*; and as, in order to make the decision consistent with the settled law, there must have been. All that is here assumed as a basis for the argument is, not that any contract or privity existed, but that the cattle were not wrong-doers as against the Toronto, Grey, and Bruce Railway Company; and this is assumed from premises which may or may not be correct, or may not necessarily support the conclusion: namely, the other assumption, that that railway company would have been liable if its engine had killed the cattle. The two propositions may not be correlative. I do not stop to inquire whether they are so or not; and I do not assume that on any ground the cattle were not wrong-doers. I have no means of inquiring into the relations between the plaintiff and the Toronto, Grey, and Bruce Company; and I do not know that some reason did not exist similar to those which, in the cases of *Clayton v. The Great Western Railway Co.*, 23 C. P. 137, and *Kilmer v. The Great Western Railway Co.*, 35 U. C. R. 595, excused the company, notwithstanding that the fences were defective.

I rest on the fact that the plaintiff was not an adjoining proprietor, either in an absolute or in any sense, as decisive in favor of the opinion expressed by the learned Judge in his charge to the jury, that the defendants must succeed unless the horses can be held to have passed from the plaintiff's land on the south. If any evidence of an entry from the south could be found fit to have been left to the jury, it would be our duty to dismiss the appeal and let the case go to a new trial, in order that the ownership of the land, and other questions, might receive proper investigation, although we might find reason to criticise the propriety of making the defendants pay the costs, when none of the evidence usually deemed necessary to prove ownership had been given. The plaintiff neither showed papers, title, nor actual possession, and did not, even, so far as the reported

evidence shows, point to this isolated bit as intended to be covered by his general statement that he had land on both sides of the railway.

As it is, however, the finding rests on mere conjecture; and that the conjecture of the jury, and not of the plaintiff or any of his witnesses. It is impossible to justify it by reference to any part of the evidence. It happened that a thunderstorm had obliterated the tracks of the cattle; and the evidence thus came to be reduced to two facts, viz., that the cattle had been left in the north field in the evening, and that they were found injured on the railway in the morning; with the aid of an idea, which may have been derivable from conflicting opinions elicited from witnesses and from viewing the premises, that *if* the cattle had been on the triangular place, it would have been possible for them to have got from it to where they were found. That it was possible for them to get there from the north field without first going to the triangle, I do not understand to have been disputed. Indeed the theory on which the plaintiff started assumed it.

Under these circumstances, it is out of the question to uphold the verdict. It must be set aside as totally without evidence to support it.

We are thus spared the task of considering some matters which may yet have to be decided; but which, as we lately intimated in *Germain v. The Grand Trunk R. W. Co. (a)*, would be more satisfactorily disposed of in a case in one of the Superior Courts, in which resort could be had to a Court of ultimate Appeal. One of these matters is the effect upon the right to damages, under the statute, of such gross negligence, if negligence is not too gentle a term, as the plaintiff admits in this case, in deliberately leaving his cattle in an unfenced field adjoining a railway. Another is the proper way to have dealt with the questions touching the southern triangle of land, if ownership, &c., had been proved. The peculiarity attaching to it is that, even

(a) As the Court granted the defendants a new trial, the case was not reported.

if it turned out that the legal title to it was in the plaintiff, it was practically more like a piece of the highway than a field. If it had been fenced, the cattle could not have got into it that night, but must have remained on the railway or gone north again. Their chance of safety arose from its being open ; and a question of some nicety would be, whether, having reached it without injury, when if injured on the way the defendants would not have been responsible, a responsibility was incurred because they happened to leave it, and run into danger again.

We must allow the appeal, with costs. The leave reserved to enter a verdict for the defendants, in place of a nonsuit, was somewhat unusual ; but as, at the close of the whole case, it would have been proper for the Judge to direct the jury that the evidence shewed the defendants entitled to succeed as to the want of fencing at the north, because the plaintiff was proved not to be an adjoining proprietor, and that there was no evidence of any escape of the cattle from the south, and therefore to have directed a verdict for the defendants, we ought not to interfere with the form of the reservation, which is followed in the rule *nisi*. The rule, therefore, will be absolute to enter a verdict for the defendants.

Moss, C. J. A.—I am of the same opinion. I desire to place my judgment upon the following short grounds. It is settled law, which, whatever may be our independent view of the true construction of the statute, we ought not now to disturb, that the statutory obligation to fence could only be invoked where the cattle of an adjoining proprietor had been injured. Here there is no ground for the pretence that the plaintiff's cattle could have got upon the defendants' road from any land to which the plaintiff can suggest any claim of proprietorship, except from the triangular piece between the Weston Plank Road and the defendants' property. But there is not a vestige of any legal proof that the plaintiff had any recognizable interest in this parcel. From the report of the evidence, there

appears to be no trace of any such claim being advanced by the plaintiff on his original examination or cross-examination, but at the very close of the case he gave an affirmative response to a suggestive enquiry whether he had not already stated the triangular piece to be his. It is superfluous to dwell upon the utter insufficiency of such a mode of proof. Finally, if there had been legal evidence of the proprietorship of this parcel, the theory that the cattle wandered by a devious and difficult, although possibly not impracticable, route to this parcel, and thence found their way to the defendants' road, rests upon a mere conjecture, unsupported by a shred of evidence. It is true that the occurrence of a violent storm rendered it difficult to perceive the traces of the animals, but there is no justification for the naked assumption that they took this not absolutely impossible, but highly improbable, route. It seems to me that it would be a most dangerous precedent to sustain a verdict given under such circumstances.

I agree that the appeal must be allowed, and a verdict entered for the defendants.

BURTON and MORRISON, J J.A., concurred.

Appeal allowed.

GREET ET AL. V. CITIZENS INSURANCE CO.

GREET ET AL. V. ROYAL INSURANCE CO.

Fire insurance—Omission to disclose threats of incendiarism—Prior insurance.

In answer to the question put by one company in an application for insurance on a mill, "Have you any reason to believe that your property is in danger from incendiarism?" and by another, "Have you any reason to suppose that your property is in danger from incendiarism?" the applicant, B., replied to each in the negative.

It appeared that the mill had been burnt some months previously, and that the origin of the fire was unknown; and that threats had been made to B. by one R., an intemperate man, who was accustomed to indulge in threats to which no one paid any attention, to burn down the mill. An anonymous letter had also been received threatening incendiarism. Persons supposed to be tramps had been seen about the premises, and B. had warned the watchman to be careful, and mentioned that he had received the anonymous letter.

Held, reversing the decree of SPRAGGE, C., 27 Chy. 121, that the answers were such a misrepresentation as avoided the policy.

Held, also, that upon the evidence, set out below, the policies were also avoided by the non-disclosure of a previous insurance.

Held, also, that the usual covenant to insure contained in a mortgage executed under the Act respecting Short Forms of Mortgages, operates as an equitable assignment of the insurance when effected.

GREET ET AL. V. MERCANTILE INSURANCE CO.

The question put by the company in this case was, "Is there any incendiary danger threatened or apprehended?" which B. answered in the negative.

Held, affirming the decree of SPRAGGE, C., 27 Chy. 121, a misrepresentation, which avoided the policy.

THESE were appeals from decrees of Spragge, C.

In the first two cases the defendants appealed against decrees ordering payment of insurance moneys to the plaintiffs; in the last, the plaintiffs appealed against the dismissal of their bill. The material facts are stated in the report of these cases in the Court below, 27 Gr. 121.

The appeals were argued on the 16th and 17th of September, 1880 (a).

(a) *Present*.—MOSS C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

Bethune, Q.C., and *C. Moss*, for the appellants, the Royal Insurance Company, and the respondents, the Mercantile Insurance Company. *Rae*, for the appellants, the Citizens' Insurance Company. It is quite clear that Brodie should have disclosed the threats which had been made to burn the mill, and allowed the companies to judge as to their weight. The mere fact that he may have attached no importance to them does not form any excuse. But the evidence conclusively establishes that he did believe that his property was in danger from incendiaries. The learned Chancellor was clearly wrong in not allowing us to prove that Brodie had, the day after the fire, accused incendiaries of having burnt the mill down, and alluded to the anonymous letter. If the true state of facts had been represented to the companies, there can be no doubt that they would have refused to take the insurance: *New York Bowery Ins. Co. v. New York Fire Ins. Co.*, 17 Wend. 366; *North American Fire Ins. Co. v. Throop*, 22 Mich. 166; *McLanahan v. Universal Ins. Co.*, 1 Peters 170, 185; *Bunyan on Fire Insurance*, secs. 59, 60, 61; *May on Fire Insurance*, sec. 208. There was, as the evidence shews, at the time of the making of the application, a subsisting insurance in the Phoenix Mutual Insurance Company upon the interest of Brodie, which was not disclosed, whereby the contract with the defendants was avoided: *Commercial Mutual Marine Ins. Co. v. Union Ins. Co.*, 19 How. 318; *Bruce v. Gore District Mutual Ins. Co.*, 20 C. P. 207; *Mason v. Andes Ins. Co.*, 23 C. P. 37; *Wyld v. Liverpool Ins. Co.*, 23 Gr. 477. In the case of the Royal the covenant to insure in the mortgage to the Worswick Engine Company did not operate as an equitable assignment of the insurance in question: *Watt v. Gore District Mutual Ins. Co.*, 8 Gr. 523; *Lees v. Whitely*, L. R. 2 Eq. 143; *In re Rawbones' Trusts*, 3 K. & J. 485. The notice of claim which is alleged to have been given to the defendants was too vague, and was not intended to constitute a lien. It was a notice which required to be followed up by action if intended to be enforced; but the evidence shews that there was no real

intention to enforce it, as the plaintiffs agreed with Brodie that he should collect the money. It was proved that there was a full settlement with Brodie, and the plaintiffs ought to have been left to their remedy against him.

Ferguson, Q.C., and *W. Cassels*, for the respondents. The learned counsel for the defendants have endeavoured to unduly impress the Court with the weight to be attached to the threats which Brodie received. But it is shewn by the evidence that they proceeded from an intemperate man, who was in the habit of threatening everybody, and that no one paid any attention to him. Under such circumstances Brodie would naturally treat these threats as idle talk; and if, as the learned Chancellor has found, neither the threats nor the single anonymous letter which he received were sufficient to cause him to apprehend any incendiary danger, it is submitted that he was not bound to inform the defendants, and so was guilty of no misrepresentation: *Abbott's Law Dictionary*, "Threats"; *May on Fire Insurance*, pp. 218, 220; *McBride v. Republican Fire Ins. Co.*, 30 Wis. 562; *Wood on Fire Insurance*, pp. 397, 399. As to the alleged omission to state that there was an insurance in the Phoenix Company, all that was shewn was that there was an interim receipt issued by the company, under which Brodie was insured for thirty days, but the evidence entirely failed to prove an acceptance of the insurance by the directors. The covenant to insure contained in the mortgage operated as an equitable assignment of the policy when effected, and the defendants were bound by the notice which they received from the plaintiffs before they settled with Brodie. The construction which the Chancellor placed upon the condition as to the disclosure of the threats in the Mercantile case was too strict. It is submitted that the insured was only bound to disclose threats which he thought were really intended as threats, and we contend the language used by Robb was not within the meaning of the question.

September 25th, 1880 (*a*). Moss, C. J. A.—Upon the argument many questions, to which it will not now be necessary to refer, were the subject of learned debate. Among other objections it was strenuously contended that the plaintiffs had not proved a sufficient equitable interest in the moneys in question, or if they had, their right to sue had been lost by their conduct.

We think that a right to sue as assignees was created by the covenant, and that the notices given ought to be deemed sufficient: and although serious questions might arise as to the effect of the settlements made by Brodie, and the extent to which, if at all, they bind the plaintiffs, we assume for the present purpose that they do not prejudice the case.

The two questions, which appear to us to call for the most serious consideration, are the consequences resulting from the answers given by the applicant, in whose position the plaintiffs stand, to the enquiries concerning danger from incendiarism and prior insurances. The question proposed by the appealing companies was, with a slight verbal difference, not material to the significance: "Have you reason to suppose that your property is in danger from incendiarism?" to which the answer was in the negative. The inquiry made by the Mercantile was in the words: "Is there any incendiary danger threatened or apprehended." A very brief statement of the facts bearing upon this branch of the case will suffice. They are carefully stated in the judgment of the learned Chancellor. The mill had been burnt a few months previously, and the origin of that fire appears to have been unknown. Threats had been made to Brodie, the mortgagor, and to others, by one Peter Robb, that he would burn the mill. This person, however, was of very intemperate habits, and accustomed to indulge in threats to which no one paid much or any attention. One anonymous letter had been received by Brodie, threatening incendiarism. Persons supposed to be tramps had been seen about the mill, and Brodie had enjoined the watchman to be very careful, and had fur-

nished him with cartridges. When hiring James Bugg he warned him to be very careful whom he admitted into the engine-house or mill, and also told him that he had received an anonymous letter. The latter statement is alone of any importance, because the admonitions to be careful might well be used without any thought of danger from incendiarism. Upon the morning after the fire he himself attributed the fire to incendiaries, and referred to the anonymous letter. I think that this evidence was plainly admissible. If on no other ground, it could be offered to discredit and contradict Brodie, and having thus obtained admission it might be used for any purpose. But it was admissible because Brodie was the person insured. No notice had then been given to any of the companies, and it was not certain upon which of them the plaintiffs would make a claim.

Under these circumstances the learned Judge thought that Brodie's answer to the Mercantile relieved that company from any liability. He held that the question being as to the bare fact whether threats had been made, the applicant was bound to mention the threats, in order that the company might, with that information before them, judge of the risk. He said that the applicant might have properly added any such circumstances, if true, as would shew that the threat involved no real danger; but whatever his own opinion might be upon that point, he was bound to answer truly as to the fact upon which he was interrogated. In this view we entirely concur, and think that the appeal against the decree in the Mercantile case should be dismissed, with costs.

But his Lordship held that the form of the question made a different principle applicable to the other cases. He thought that if the applicant had not reason to believe in the danger, he might, notwithstanding Robb's threats, and notwithstanding the anonymous letter, truly, (and therefore properly,) answer that he had not reason to believe in the existence of such danger. With great deference, it appears to us that this, if it is to be understood literally, is introducing a dan-

gerous ground of decision. What the plaintiff believed is locked in his own breast, except so far as he may choose to disclose it. What he has reason to believe can scarcely be determined except by considering what a reasonably prudent man, not an extremely timid or suspicious man, but a plain man of ordinary common sense, would consider gave him some reason for believing in the existence of such danger. He may not be bound to mention every idle rumour, as is laid down in *New York Bowery v. New York*, 17 Wend. 381, but the smallest measure of duty imposed upon him is, to disclose what would seem to a reasonably prudent man to imply some risk. We may refer to the judicious observations of Mr. Justice Cooley, in delivering the judgment of the Court in *North America Fire Insurance Co. v. Throop*, 22 Mich. 166. In view of Brodie's own increased precautions, it may well be thought that he felt there was reason for apprehension. The learned Judge has met this point by observing that the applicant regarded Robb's threats as idle threats unworthy of attention, and the threatening letter he also regarded as idle, at most making him additionally careful, but not leading him to believe, with his care and caution, that his mill was in any danger from incendiaries. It appears to me that this introduces an element which is not a component part of the inquiry. The company do not seek to be informed whether the applicant is taking sufficient precautions against danger. If the view which this part of the judgment seems to sanction were adopted, it appears to us that the applicant could defend his answer by saying: "It is true I had reason to believe that there was danger, but I also believed that the care and caution I was using would prevent any mischief." We therefore incline to the opinion that in these cases the insurance was avoided by these answers, which the application required to be just, full, and true, and made the basis of the liability of the company, and a condition of the contract for insurance.

Upon the second question, namely, the undisclosed insurance in the Phoenix, we think that the defendants are also

entitled to succeed. This transaction commenced with the giving of an interim receipt, as to which we agree with the plaintiffs that its effect was only to insure the premises for thirty days, unless the application was approved by the directors. The point for adjudication then is, whether there was such approval. It is properly conceded that this issue is precisely the same as if an action were in course of trial against the Phoenix. Adopting that test, it appears to us that that company would be fixed with liability, and that, therefore, the ground that this insurance was not in force, which was the only answer made by the defendants to this objection, was removed. Mr. Crossin, the agent of the company, said, that he did not know that the application had not been accepted. But if any person could shew that the board had not approved of this risk, it ought to be Mr. Brandon, the managing director. The material parts of his evidence are as follows: It is the practice of the company to notify within thirty days, if they do not intend to accept, but he can find no trace of any such notification to Brodie. He thought that the application was accepted; that was his impression; he had no doubt it went through; he had no doubt in his own mind it was accepted. We think that, without more, this would be sufficient evidence as against the company to establish an approval, and that that alone would constitute a valid insurance for three years. It might have been more satisfactory to see the minute book kept of the directors' proceedings, but as against the company, in whose possession the book is, the evidence is complete. Then the approval being shewn, the company cannot take advantage of the want of a policy. But if they could, there is sufficient proof that a policy was issued. Mr. Brandon states that one was drawn up, but, *he thinks*, never completed. His reason for not sending it was, that premiums were long overdue by Brodie upon two previous insurances, and he desired payment before issuing this policy; but of this wish or intention no notification was given to Brodie, who had duly given his premium note and undertaking upon the insurance now in

question. Although the policy that was prepared is not produced by the company, and is presumably destroyed, there is a copy in their policy-book. This appears in regular order among a number of other policies, which are in force. It is numbered 1264. Across it is now written "declined," which is confessedly an inappropriate expression to apply to a policy, and it is extremely probable that this was written at a much subsequent date. Its endorsement seems to us to be very suspicious, and it is not uncharitable to surmise that it would not have appeared but for the occurrence of the fire on the 10th of March. At any rate it is pretty certain that it had not been made on the 6th of March, when a letter was written to Brodie in these terms: "Your note for insurance, under policy 1264, falls due on the 18th inst. Please remit amount to retire same to this office, seventy dollars, and we will return you it by mail." This seems absolutely overwhelming evidence to prove that at this date, four days before the fire, the company were treating him as insured, and his application as accepted. In view of Mr. Brandon's inability to say positively that the policy had never been forwarded to Brodie, it does not appear to be a wholly wild suggestion on the part of these defendants that that person could, if he chose, throw some further light upon the question. As bearing upon the question of Brodie's *bona fides* or carefulness in answering, it is not immaterial to observe that after the fire he thought himself that there was an insurance in the Phoenix, and in that belief called at their office to make a claim. In *Mason v. Andes Insurance Co.*, 23 C. P. 37, Hagarty, C. J., said, at p. 45: "I do not consider it necessary to shew the issue of an actual policy to Harris. If his interim receipt entitled him to require a policy to be issued, or protected him until the head office had declined the risk, he was, I think, in the same position as if the policy were actually given." Similar doctrines are enunciated in *Hatton v. Beacon Insurance Co.*, 16 U. C. R. 317, and *Bruce v. Gore District Mutual Insurance Co.*, 20 C. P. 207. Now under this

receipt approval alone was sufficient to complete the contract. It acknowledges the receipt of an undertaking, being the premium for an insurance for the term of three years, "subject, however, to the approval of the board of directors in Toronto;" language which makes the mere approval confirm the contract as one for insurance for three years.

We think, therefore, that in the other cases the appeals must be allowed, with costs; and the bills in the Court below dismissed, with costs.

MAY V. THE STANDARD FIRE INSURANCE COMPANY.

Fire insurance—Seizure of goods under execution—Condition of forfeiture of policy therefor—Construction and validity thereof.

By an additional condition of a policy of insurance it was provided that if the insured property should be levied upon, or taken into possession or custody under any legal process, or the title should be disputed in any proceeding in law or equity, the policy should cease to be binding upon the company.

After the insurance was effected an execution issued against the goods of the insured, under which the bailiff made a formal seizure, but did not deprive the insured of their possession or custody, or place any one in possession, and upon a bond being given a day or two afterwards, the seizure was withdrawn.

The Court of Common Pleas held that this was a valid seizure, and that the plaintiff, who was mortgagee of the goods and to whom the loss was payable, could not therefore recover.

Held, reversing this judgment, that the plaintiff was entitled to recover.

Per BURTON, PATTERSON, and MORRISON, J.J.A., that there had not been a seizure within the meaning of the condition, which refers to an actual custody and change of possession.

Per ARMOUR, J., that the condition was not binding on the insured, as it was not printed in compliance with R. S. O. ch. 162, sec. 4.

Wilson v. The Standard Fire Ins. Co., 29 C. P. 308, followed and approved of.

Semble, *per* PATTERSON, J.A., that the condition was void, as being unjust and unreasonable.

Remarks by PATTERSON, J.A., as to the principle and considerations upon which the validity of a variation of or addition to the statutory conditions should be tested and determined.

APPEAL from a judgment of the Court of Common Pleas, making absolute a rule *nisi* to enter a verdict for the defendants.

The action was brought upon a policy of insurance effected by John Kilpatrick upon his billiard tables, and the cues, balls, and furniture of his billiard room in Guelph, which contained a provision that such loss or damage as should have been ascertained and proved to be due under the policy to John Kilpatrick, should be payable to Samuel May, of Toronto, as his claim might appear.

The pleadings and facts are fully stated in the report of this case in the Court below, 30 C. P. 51, and in the judgments in Appeal.

The case was argued May 19, 1880 (a).

C. Robinson, Q. C., for the appellant. It would be difficult to frame a more unreasonable condition than that relating to seizure under execution, upon the alleged breach of which the Court below decided in favour of the respondents. Even if it would be just and reasonable under certain circumstances, it is clearly unjust and unreasonable as applied to this case, and it should have been so held: *Sands v. The Standard Ins. Co.*, 26 Gr. 113, 27 Gr. 167; *Ballagh v. Royal Mutual Ins. Co.*, 44 U. C. R. 70, 5 App. R. 87. But the condition is also invalid on the ground that it is not printed in the manner directed by R. S. O. ch. 162; in which case section 5 of that Act declares that it is not binding on the assured. It is true that this objection was not taken before, but the Court cannot refuse to entertain it for that reason, as it cannot be in any way affected by further evidence: *Gray v. Richford*, 1 App. R. 112, 2 Sup. C. 431. It is submitted, however, that the facts which appear in this case do not constitute a levy upon or taking into legal possession within the meaning of the condition: *Churchill on Sheriffs*, 106-197. He also cited *Wood on Insurance*, 164, 530; *Angell on Insurance*. sec. 62; *Marrin v. Stadacona Ins. Co.*, 4 App. R. 330; *Herman on Mortgages*, 465.

Bethune, Q. C., for the respondents. The authorities establish that what took place here amounted in law to a valid seizure: *Watson on Sheriffs*, 242; *Abbott's Law Dictionary*. The condition is just and reasonable in so far as it affects this case, as is fully shewn by the judgments of the Chief Justice of the Common Pleas, and Osler, J. The appellants should not now be allowed to argue that the statute has not been complied with in reference to the printing, as the point was neither taken at Nisi Prius nor in the Court below. As to the eighth plea, our contention is, that *Wilson v. The Standard Ins. Co.*, 29 C. P. 308, was wrongly decided, and if so we are clearly entitled to succeed

(a) Present.—BURTON, PATTERSON, and MORRISON, JJ. A., and ARMOUR, J.

on the issue joined on that plea (*a*). This action cannot be maintained in the appellant's name, as he was not the insured.

September 7th, 1880. BURTON, J. A.—It is not necessary, in the view which I believe we all take of the evidence in this case, to come to any decision as to whether the condition referred to in the seventh plea is just or reasonable.

That evidence clearly established that after the effecting of the policy, and before the loss, a writ of *fi fa* was duly issued against the goods and chattels of the insured, and placed in the hands of the proper sheriff for execution, and that the sheriff's officers had gone to the premises and made what in law might constitute a levy. Neither the sheriff nor the insured could probably be heard to say that such a seizure was not made as was equivalent to a levy, but was it such a levy as was intended by this condition? Was it in the contemplation of the parties that the policy should cease on a mere technical levy such as is proved here, which did not increase the hazard of the insurers, when the insured still remained in the full enjoyment of the property, and did not part with the possession for a single moment, and when he had in fact the same power and the same interest to preserve the property which he would have had if the execution had not been levied?

The first part of the condition referred to (*b*) is aimed against *alienations*, and provides for a forfeiture of the policy in the event of an alienation of the property insured or any transfer or change of title, and it might be contended with some force that the words "levied upon," in this connection, might be held to refer to the complete execution of the writ by appropriating the goods and chattels of the debtor to the payment of the sum which the sheriff is directed to levy—in other words, so as to cover an involuntary as well as a voluntary alienation or transfer.

(*a*) See this plea set out, *post*, p. 611.

(*b*) See the condition set out in full, *post*, p. 616.

But assuming that the words do not bear that meaning, but refer to a seizure under final process, and that the words which follow are intended to apply as they probably do to a seizure under any other legal process, it can scarcely be assumed that any difference was contemplated between the nature of the acts which should cause a forfeiture. Under the latter words, there must be a taking into possession or custody; can we suppose that any thing less than this was intended under the words "levied on"?

It may be, and speaking for myself I should say that it is by no means an unreasonable thing for the company to stipulate that the goods insured should remain under the control of the insured, whose character for care and caution may have been an element in their consideration and adoption of the risk originally, and they may have been unwilling to continue the risk if the goods should be taken out of his possession, and placed under the control of a class of people not proverbial for their consideration of the interests of others, and who would not have the same motive that the insured might be supposed to have in preserving a property, in which to some extent he would be his own insurer.

It is easy, therefore, to find a reason for guarding against an involuntary *change of possession*, as well as an *alienation* voluntary or involuntary; but not for avoiding a policy, because a bailiff tells the insured to consider the property insured under seizure.

I am of opinion, therefore, that under a levy or under any other seizure, an actual change of custody and possession was intended, and that that is the proper interpretation to place upon these words.

That being so, I think we should re-instate the verdict which the learned Judge at the trial entered for the plaintiff, and which the Court below, treating the alleged seizure as a levy within the meaning of the condition, has entered for the defendants on the ground that the condition is just and reasonable.

I am not at all prepared to differ with the latter part of that conclusion, if the words "levied on" be treated as "taken

out of the possession of the insured," although for the reasons I have mentioned I have not thought it necessary to consider whether the condition is or is not open to objection as being unjust or unreasonable, but I must dissent from the reasoning by which the experts called by the insurance company attempted to support it as applied to this case, one of them saying that if a man is doing a profitable business, we consider the "*moral risk*" much less than if he is in the hands of the sheriff.

This may possibly be very true, but if it were to be a ground for avoiding a policy, it would apply to cases in which a writ is in the sheriff's hands, as well before as after seizure, and in fact to every case in which a man becomes embarrassed. The only reasonable interpretation to place upon this condition is, I am convinced, that in every case where a *change of possession* takes place under legal process, the policy shall cease to be binding, and as no such change of possession occurred here even for an instant, the plea is not sustained. I agree with the finding of the Judge on the issue found on the eighth plea.

The appeal should therefore be allowed, with costs, and the rule to enter a verdict for the defendant discharged, with costs.

PATTERSON, J. A.—The action is brought in the plaintiff's name because the policy contained the words: "Such loss or damage as shall have been ascertained and proved to be due under this policy to John Kilpatrick shall be held payable to Samuel May, of Toronto, as his claim may appear." This is rendered, not quite accurately, in the declaration, by the statement that the defendants agreed with Kilpatrick "that the amount of such loss or damage, if any, should be paid by the defendants to the plaintiff."

It is noted as a reason against this appeal, and it has been urged before us, that no action will lie in the plaintiff's name. No such objection was taken at *Nisi Prius*, or in the Common Pleas. It is not one which we should entertain when made for the first time at this stage of the case. But it cannot be treated as in any way

proper to be considered. The declaration does not in terms allege a contract with the plaintiff. The objection should have been taken by demurrer or motion in arrest of judgment. There is a plea of *non est factum*, but no point was made under it in the Courts below; and probably none could have been successfully made, for the deed is substantially what the count alleges.

Therefore I do not propose to inquire what meaning, if any, can be attached to the words, "as his claim may appear"; or whether the clause can properly be read as a covenant with the plaintiff; or what its legal effect may be.

There are in all ten pleas, very few of which are attempted to be supported by evidence.

Those noticed in argument before us were the fourth, seventh, and eighth.

The fourth, which denies *the plaintiff's* interest in the goods, is relied on in one of the reasons against the appeal, (though Mr. Bethune did not press the point,) as supported by the circumstance that Kilpatrick had mortgaged the goods to the plaintiff, and was in default; overlooking the fact that Kilpatrick is not the plaintiff, and that the argument shews that the plaintiff owned the goods absolutely. It is clear, however, that Kilpatrick had still an insurable interest, and that so had the plaintiff.

The seventh plea sets out a condition, indorsed upon the policy, that if the property should be levied upon or taken into possession or custody under any legal process, or the title be disputed in any proceeding at law or equity, the policy should cease to be binding upon the company; and avers that the sheriff, having a *fi. fa.* against Kilpatrick, did seize and take in execution the property.

Issue is joined on this plea; and the plaintiff also replies specially that the condition is not one of those authorized by the statute,—by which I understand him to mean that it is not one of those contained in the Uniform Conditions Act: that no seizure or levy ever took place whereby the

possession of the goods in Kilpatrick, or the interest of the plaintiff therein, was in any way affected, or the defendants in any way prejudiced : and that under such facts the condition was not just and reasonable.

The contest really turns upon the seventh plea, involving two principal questions, viz., whether the condition was broken ; and whether the condition is just and reasonable : which latter question may be taken to be sufficiently raised by the replication, whether or not that pleading suggests the true criterion of justice and reasonableness.

The eighth plea requires to be more fully analysed, in order to apprehend what it is meant to set up.

It alleges that there was a further condition indorsed on the policy, that the *application* of the insured, the *survey and diagram* of the premises, and *all things therein contained*, should be taken and considered as part and portion of the policy ; and if in the application, survey, and diagram the assured should make any erroneous or untrue representation or statement, or omit to make known any fact material to the risk, the policy should be null and void. So far the plea correctly sets out that part of the seventh additional condition which relates to the immediate subject, using the very words of the condition. It then proceeds to aver that Kilpatrick, in and by his *application*, erroneously and untruly represented and stated that there were no other *buildings or premises* within one hundred feet of the building in which the goods were, except those in the *said application* mentioned, “and also in and by his said application made and furnished a false diagram and survey of the premises in which the insured property was situated, other than those in said survey and diagram shewn.” I cannot say I understand what this last sentence means. Then the plaintiff goes on : “Whereas, in truth and in fact, there were buildings and premises within one hundred feet of the building in which the said insured property was situated, in which he represented and stated that there were no buildings or premises within one hundred feet of the building in which

the said insured property was situated other than those in said application mentioned, and in said survey and diagram shewn." There may be some clerical or typographical error in this passage. I suppose it is meant to amplify the preceding allegation that Kilpatrick untruly represented that there were no buildings within the hundred feet except those stated. The remainder of the plea is quite outside of the terms of the condition, and ought to have been moved against and struck out. It is, "such *representations* being of facts material to the risk," (the condition speaking of materiality only in connection with *omissions*,) "and to be known to the defendants in order to enable them to judge of the risk they would undertake by said policy," (which words are not found in the condition at all,) "and said John Kilpatrick concealed from the defendants and omitted to make known to them in said application, diagram, and survey, the situation of the said other buildings," (concealment not being touched upon by that name in the condition; and the omission to state the situation of the buildings being penal only in case the situation was a fact material to the risk, which is not averred).

Before leaving this plea let us see how it is supported, leaving the consideration of the seventh plea until later.

We have two documents upon one paper, viz., the application and the diagram. The seventh additional condition, which is correctly set out in the eighth plea, observes the distinction between the two documents; and so did the pleader in drawing the plea, until he attempted to state the breach of the condition, when we find them confused a good deal.

The application, which is one of the defendants' printed forms, is headed with the words, : "General Instructions for guidance of Applicants"; followed by directions as to how to state values, sums to be insured, and descriptions in some cases; but without a word respecting the diagram.

Then comes the place for the statement of particulars

respecting the insurance wanted, being the application proper, and then this further direction: "The applicant will answer to the following questions, and sign *the same* as a description on which the insurance is to be predicated;" followed by twelve questions. After the questions, and on another side of the paper, is the word DIAGRAM, and under it this direction: "Use red ink for brick or stone, and black for frame. Mark fire walls with double red lines. Give all exposures within 100 feet, and mark distance between buildings."



In the printed questions there is not a word on the subject of buildings within one hundred feet. It is contended that the direction I have just quoted requires the applicant to mark them on the diagram. I do not so understand it.

I take the direction to be addressed to the agent of the company, and not to the applicant.

To attach any meaning to it requires some acquaintance with the business of insurance. To an unskilled person, like the generality of those expected to insure, it means nothing. The present insurance is on goods. What is the owner of them to understand by reading the word "diagram"? Those familiar with these things know that a sketch of the ground plan of the building containing the goods is expected, but that knowledge is not conveyed by this paper. Then red ink and black ink are to be used. It is not to be supposed that every farmer who is invited to insure has these at hand. Then comes the word whose comprehensive significance the company rely on—"Exposures"; "Give all exposures within 100 feet." Within 100 feet of what? The agent knows; but the applicant is not informed. What is an *exposure*, and how is it to be *given*? The experts tell us, in evidence, that an exposure means, in insurance parlance, a building or anything else which increases the risk of fire to the subject of the insurance. The secretary of this company, Mr. Crawford, says, it is a wider term than "buildings," and includes a pile of lumber or anything of that kind. It is thus a term of art, which has a meaning to those instructed in the business, but to the uninstructed conveys no definite idea.

Now, notwithstanding Mr. Crawford's bold assertion under oath, that by the terms of the application "they required to be informed of all buildings within 100 feet," I hold without hesitation that they gave no information to the applicant that they required anything of the sort; and that if they required it at all, it was solely from the agent, who alone could translate the language employed. This, I need hardly say, is not what Mr. Crawford means to convey by what he swears to. I find further confirmation of my reading of the instrument in what immediately follows. Beneath the space left for the diagram is printed the following passage: "It is hereby expressly agreed, declared, and warranted that each and every of the answers as above made is true, and that the same and this application and survey and diagram of the premises herewith, shall be part of the insurance contract and policy hereby applied for, and shall be held to form the basis of the liability of the company." On this I merely remark, that the distinction is again observed to which I have before adverted, between the application and what is called the "survey and diagram;" and that whatever the word "survey," as here used, means among insurance men, there is nothing to indicate to the applicant what it is meant for here. In the next sentence the agreement, declaration, and warranty adds: "And that if the agent of the company fill up the *application* he will, in that case, be the agent of the applicant, and not of the company," a recognition and notice to the applicant that the agent, who alone knows what is wanted in *the diagram*, and who must often be the only person engaged in the transaction who has the requisite skill, to say nothing of the red ink, makes *it*, not for the applicant, but for the company; though he may, at the same time, fill up the *application* for the applicant.

I do not find anything in the rest of the application paper to make a different holding necessary. The concluding agreement, &c., from which I have been quoting, contains some further particulars, principally relating to

stoves and ashes, and winds up by saying : " And that no fact relative hereto within the knowledge of any agent shall be deemed to be known to the company, unless the same be expressed herein or hereon ; and that the foregoing is a full, just, and true exposition of all the facts and circumstances, condition, situation, and value of the property to be insured, so far as the same are material to the risk.  Survey in all cases to be signed by applicant : in no case by agents effecting insurance  " ; and then comes the applicant's signature at the foot of this curious mixture of what the company says, and what the applicant is supposed to say. The warranty, as it is called, is, that the *answers* are true, viz., the answers to the questions, which had no reference to surrounding buildings ; and that the *answers* and the *application*, and the *survey*, and the *diagram*, shall be part of the insurance contract and policy, and shall be held to form the basis of the liability of the company. What this means as applied to the diagram I do not quite understand ; but I take it that it cannot extend the effect of what is told the applicant at the beginning, viz., that he is to answer *the questions*, and sign *the same* as a description on which the insurance is to be predicated. Whatever this *predication* is, it is distinctly confined to the questions and answers.

There is, therefore, in my opinion, no reason whatever for holding the eighth plea to be proved. From the report of this case in the Common Pleas it appears that questions under the eighth plea were not argued or considered. I suppose, as they have been made part of the contest before us, the subject was treated as settled, so far as the opinion of the Court below was concerned, by the case of *Wilson v. These Defendants*, lately decided there (29 C. P. 308). The correctness of that decision is brought in question by the defendants' contention before us. After the remarks I have made it is scarcely necessary to add that it has my concurrence.

I now return to the seventh plea.

The plea does not set out the condition in full, although

it correctly states the part immediately relied on. At its full length the condition reads thus ;

“ V. When property (insured by this policy), or any part thereof, shall be alienated, or in case of any transfer or change of title to the property insured, or any part thereof, or of any interest therein, without the consent of this company indorsed hereon, *or if the property insured shall be levied upon or taken into possession or custody under any legal process*, or the title be disputed in any proceeding at law or equity, this policy shall cease to be binding upon the company.”

The plea alleges, as a breach, that the sheriff, under an execution upon a judgment against Kilpatrick, *seized and took in execution* the insured goods. This is not the language of the condition, which speaks of the property being *levied upon or taken into possession or custody* ; and the plea is thus an instance of the looseness which is becoming so common and so embarrassing. It may perhaps be permissible to treat the allegation as intended to aver nothing more than that the sheriff levied upon the goods or took them into his possession or custody ; although the plaintiff, who has taken issue upon it as it stands, would have no right to complain if held more strictly to the issue. The evidence of the sheriff's bailiff shews clearly enough that what he did, while it may have amounted in legal effect to a seizure and taking in execution, was nothing more than what he himself described as a “formal seizure.” He went to the billiard room, where he says he supposes the business was going on as usual. He went through the form of a seizure. He stayed, probably, half an hour. He did not at that time take any share in the games. He did not place any one in possession. He went away ; and a day or two afterwards got a bond. This is the history he gives. It is quite evident there was no such taking of the goods into his possession or custody as deprived Kilpatrick of the possession or custody of them for an instant. I apprehend that, if anything more was done by way of disturbing Kilpatrick's possession, the company, who

had to establish the forfeiture, would have brought it out distinctly. The reliance appears to have been upon this formal act of the bailiff, who did all that his duty required him to do under the circumstances, as effecting in law a levy, a bond being offered and drawn up by the bailiff himself, and its execution only delayed by the absence of the surety. And it strikes me that it was the words "levy upon," and not the phrase "take into possession or custody," that the pleader meant to paraphrase by his expression "seized and took in execution." The question of construction is, therefore, in my opinion, confined to the legitimate force of the words "levy upon" in the condition. The ordinary rule, which requires a provision that works a forfeiture to be construed strictly, ought, I think, to be applied to a condition such as this. But we must read it with some allowance for the use of words in their popular, rather than their technical acceptance, as well as with the indulgence indicated by the maxim, *mala grammatica non vitiat chartam*. "If the property shall be *levied upon*" is an inaccurate expression. To levy is to raise. In legal phraseology money is levied upon lands or goods; taxes are levied; soldiers are levied; war is levied; and for levying a fine on lands we find in ancient times the word *rere* a fine. (*Tomlin's L. D. tit. "Levy."*) "*Levied upon*" is evidently used in this condition, as other expressions in the documents put forth by this company are used, to express something not conveyed by its proper signification; and this something must be connected with the effect of an execution. It can scarcely be meant to express the binding of the property by the delivery of the writ to the sheriff to be executed, for that preliminary effect, which neither divests the title to the goods nor the possession of them, is not very cognate to the general scheme of the condition; and, besides, the word "levy" is not, so far as I know, popularly used in that sense. I take it to be used for "seized upon" under execution; and that its force must be governed by the words which follow it, and are explanatory of it, viz., "taken into possession or custody."

I read the whole phrase, "levied upon or taken into possession or custody," as equivalent to "levied upon by being taken into possession or custody."

Having regard to the general scheme of the condition, which is principally directed against alienation or change of title or possession, and giving some effect to the sound principle of "*noscitur a sociis*," I think this construction is reasonable in itself, in harmony with the context, and applicable without violence to the words themselves.

In this sense, however, the condition has not been broken. The goods remained, notwithstanding what the bailiff said or did, in fact, and for all purposes capable of affecting the hazard insured against, as much in the possession and custody of Kilpatrick as when the policy was effected. They may have been for a few minutes technically in *custodiâ legis*, as the goods were in the cases of *McIntyre v. Stata*, 4 C. P. 248, and *Castle v. Ruttan*, Ib. 252. If this was a seizure or taking into possession or custody within the meaning of the condition, of course its short duration would make no difference. But reading the condition on the principle of construction I have applied to it, and in view of its proper purpose in this insurance contract, I consider an actual and not a merely technical custody and possession required to establish the breach and work the forfeiture.

There remains the question of the justice and reasonableness of the condition—a question which I do not wish to pass over in silence, although its solution is not in my view essential to the disposition of this appeal, because I hold that the condition has not been broken.

The exact principle on which, under the statute, the validity of these conditions should be tested, or the standpoint from which the inquiry should be approached, has not yet been settled by judicial decision. While, therefore, I agree with much that has been said on the subject of this particular condition in the Court below, and in *Sands Case* in the Court of Chancery, 26 Grant 113, 27 Grant 166, I am pleased to have an opportunity of adding a

few words, without committing myself so decidedly as if the case turned upon the question, to opinions which upon further discussion I may see reason to modify.

One consideration I am disposed to set entirely aside, although I observe some little weight attached to it by the Chief Justice in the Court below; and that is, the consent of the insured to the condition as part of the contract. Before the statute the whole policy and all within it or upon it had to be treated as understood and agreed to by the insured, while it was well known that in most cases but little of it was understood, and still less in reality agreed to. The statute rejects the fiction of agreement; and, truly regarding every variation of or addition to the statutory conditions as something *exacted* by the company or individual insurer, not voluntarily agreed to by the insured, requires the variations and additions to be accompanied with the declaration that they are in force so far as by the Court or Judge before whom a question is tried relating thereto, they shall be held to be just and reasonable *to be exacted*—which I understand to mean *insisted on* as one of the terms on which the policy is granted.

On this view I ventured to suggest in *Ballagh v. Royal Mutual Ins. Co.*, 5 App. 87, that, in testing the validity of the condition, we should regard the question as arising at the time of the making of the contract of insurance. If a condition is unjust or unreasonable, it should have no place upon the policy: the insured is entitled to have the undertaking of the company untrammelled by it; and the company has no right to insist upon inserting it, or to *exact* it, as a term of the insurance. I suggested also that the test, while properly applied as of the date of the policy, must have reference to the particular transaction; and that any given condition would not necessarily be either good in all cases or bad in all cases. It could only be with reference to particular policies that the question could ever arise for adjudication. The condition discussed in *Ballagh's Case* afforded a good illustration. It avoided

the policy for non-payment at the day of any note given for a premium.

Assuming a transaction in which the assured was giving his note payable at the office of the company and not otherwise or elsewhere, and not negotiable, there might be nothing unreasonable in the condition; while, if the note was negotiable and payable generally, it would be very unreasonable to exact it.

It may be that few conditions are capable, like that one, of being read as objectionable or unobjectionable, as they happen to be applicable to one phase or another of the original contract. Most of them are doubtless so general as to be reasonable or unreasonable alike in every case. But that circumstance does not affect my point. Apply the test as of the date of the contract. If unreasonable then to impose a certain condition in the particular case, it is none the less so because the same condition is unreasonable in all cases. While, if reasonable in the case of the particular contract then being negotiated, it is not to be called unreasonable because it might be so in other circumstances.

I think that for the sake of certainty and uniformity in adjudicating upon these conditions it is necessary to test them as of the date of the policy, and not with regard to the circumstances under which a loss occurs. A condition may be perfectly reasonable in itself, and yet relate to something so entirely foreign to the ultimate cause of loss, as to make the attempt to insist upon it appear harsh and dishonest. In such a case it would often be found difficult to decide fairly if we regarded only the position after the event; and it would be unjust to insurance companies to expose them to the risk of a decision possibly influenced by some peculiar hardship of the case in hand. On the other hand, take a condition like the one before us, as read in the Court below. It is said that it would be unreasonable to insist that a policy should be avoided because the goods were seized under some process of law of which the insured had no notice, and to which he was

no party, which seizure would nevertheless be within the language of this condition; but that inasmuch as the condition also covers seizure under an execution obtained after proceedings, of all of which he had notice, and as that was the breach which actually occurred, the condition should be held under the circumstances reasonable and the policy justly forfeited.

I cannot fully assent to the reasoning on which this idea proceeds. I think that if we are to judge by the event, we should not be bound to confine our view to the one condition; but should be at liberty to take notice that although, in the construction put upon it by the Court below, there there may have been a technical breach of its literal terms, yet neither was the loss occasioned nor the risk increased by what occurred. To enforce the forfeiture under these circumstances might well be denounced as by no means just or reasonable. From the premises assumed I should draw the conclusion—not that no injustice would be done by enforcing the condition, but that although the result produced manifest injustice, because the penalty had little or no relation to the offence, it must be submitted to as the consequence of the contract. But when we say this we have again removed the question from the event after the loss to the making of the contract.

There are two alternatives. We are either to say if the company can justly under the circumstances, *enforce* the condition,—an inquiry which I think could scarcely, in fairness to the companies, be intended; or we are to determine if, from the nature of the condition itself, as attached to the particular contract of insurance, it was just and reasonable for the company to *exact* it, this inquiry necessarily referring to the time at which it was exacted.

The more difficult question, to my mind, is, what should be the test of the justice and reasonableness of a condition? Looking at it as of the date of the policy, the whole scope of the condition, as it was then presented, should doubtless be kept in view, with the possibility of circumstances

arising which would, without any act or default of the insured, place him at the mercy of the insurer. Conditions of this character are easily found upon many of the policies one meets with. I believe it was their prevalence that called for the interposition of the Legislature, and led to the passing of the statute under which we are now acting; and I think that any one who takes the trouble to compare a set of those conditions with the uniform conditions provided by the statute, will find the chief distinction to be that the latter, while aiming at making provision for everything reasonably necessary for the protection of the insurer, are so framed that a person who is insured, and who exercises ordinary care and intelligence, can understand and comply with them. Insurers may consider that some subjects which are not touched by the statutory conditions, ought to be provided for. Additional conditions framed for such purposes, in the same spirit as those given by the statute, should, I think, be favourably considered, with the view to restrict as little as possible the freedom of insurers in doing what they deem important for defining in the terms of the obligation they undertake. But conditions dealing with the same subjects as those given by the statute, and being variations of the statutory conditions, whether they are classed upon the policy as variations or as additional conditions, should be carefully scrutinized. They should, in my opinion, be tried by the standard afforded by the statute, and held not to be just or reasonable if they impose upon the insured terms more stringent, or onerous, or complicated than those attached by the statute to the same subject or incident. Without such watchfulness on the part of the Courts there will be danger of the statute being evaded, and the evils restored, in the name of variations or additional conditions, which it was its purpose to abolish.

I may refer by way of illustrating my meaning to what we find on the policy now before us.

Thus we have certain conditions, called additional conditions, which are really variations of statutory ones.

Amongst them is the very one which is relied on in the seventh plea, and which varies the provision respecting the effect of alienation, &c. Another is on the subject of erroneous representations, and is the same set up in the eighth plea. It varies the first statutory condition by in effect striking out of it several things very necessary to make it fair to the insured.

We have, among the ostensible variations, one of the most objectionable of the old conditions reintroduced, requiring all the proofs, declarations, evidences, and examinations to be completed within thirty days after the fire, a demand which, as has sometimes been practically proved, and, as was forcibly pointed out in the judgment delivered by Wilson, J., in *Smith v. Commercial Union Ins. Co.*, 33 U. C. R. 69, is in many cases, owing to the nature of the business or the loss, impossible to be complied with, and which may nearly always be rendered so by a company disposed to abuse the powers which the conditions give. We have also, under the name of a variation, an additional condition, making the insurers the judges of how much is to be paid to the insured. It provides that after receipt of notice and proofs "the *Board of Directors* shall ascertain and determine the amount of such loss and damage, and *such amount* shall be payable in three months after the receipt by the company of such proofs."

I refer to these few conditions, not as being the only ones upon this policy open to criticism, but as enough to shew that care is very necessary in examining variations introduced into the statutory conditions, as well to protect the insured in the particular case which may be on hand, as to guard against a return, by indirect approaches, to the state of things which the Legislature aimed at getting rid of.

In judging one of these conditions which varies a statutory one, whether called an additional condition or a variation, my impression is, that we ought to take the condition as a whole. It is the practice, I believe without exception, to divide the conditions according to the general

subject of them, although the separation of subjects may not always be skilfully accomplished, and usually to designate them by numbers. I do not think the Courts can reasonably be asked to analyse a condition for the purpose of discovering if some part of it may not be separated from the rest, and held just and reasonable, while the rest of it must be condemned. This process could scarcely be suggested in case the question were considered at or as of the date of the negotiation of the contract. Judging, however, after the loss, and when the enforcement of the condition engages attention, it may not be unnatural to incline only to look at the specific provision which touches the immediate facts, and to regard the condition as if it provided for those facts alone.

I do not think that should be the mode of dealing with the matter. *Primá facie* we should assume that the statute has done all that was necessary, as well as what is just and reasonable, in the provision it has made upon the subject. There should be no presumption that any variation was required. If a variation is attempted by the insurer, it does not strike me that he can reasonably complain if we take each proposed condition as one, and reject it all together, if as a whole it is not one that he can justly and reasonably exact, or impose on the insured. I am aware that this suggestion, though correct, as I think, in principle, may not always be easily applicable.

I have one more remark to make, which is probably a repetition of something already said, and that is, that in considering the question whether a condition is just and reasonable when it deals with the same subject as one of the statutory conditions, we must bear in mind that the statutory condition is also there; and that the question therefore really is, whether it is just and reasonable to exact the other *in addition* to what the statute provides, or by way of qualification of it.

Looking at the condition now in debate, one question would be, is it just that alienation should vitiate the policy, without any such reservation as the statutory condition

makes in case of change of title by succession, or by operation of law or by death? It is not clear that the additional condition, besides omitting this reservation, goes further than the statutory one, except in two particulars—one avoiding the policy by levy or seizure of the property under legal process, and the other by reason of the title being disputed in any proceeding at law or in equity. The former of these, if it has the meaning we have attached to it, might not, standing by itself, be an unreasonable stipulation; for the latter I perceive no rational justification. Taking the condition as a whole, and having regard to the statutory one which it varies, my opinion is adverse to its validity. But as the decision of this point is in our view of the facts unnecessary at present, I rest my decision upon the ground that the pleas are not proved. I agree that we should allow the appeal, with costs.

ARMOUR, J.—I think that the condition set up by the seventh plea is not legal and binding on the insured. It is a condition added to the statutory conditions endorsed on the policy sued on, and is not added in the manner required by R. S. O. ch. 162 sec. 4.

It is unnecessary for me to add anything to what I said as to noncompliance with the law in this respect in *Ballagh v. The Royal Ins. Co.*, 44 U. C. R. 87.

The defence set up under the eighth plea is sufficiently disposed of by the case of *Wilson v. The Standard Fire Ins. Co.*, 29 C. P. 309, which I think good law.

MORRISON, J. A., concurred.

Appeal allowed.

WILLIAMS V. CORBEY ET AL.

Commission agent—Contract made in Ontario—Custom—Evidence of.

Held, reversing the decree of BLAKE, V.C., that the evidence, which is fully set out below, clearly established that the plaintiff was acting as a commission agent for defendants, in the purchase of the corn in question at Toledo, and not as vendor on his own account, and that the defendants were not, therefore, justified in refusing to accept a bill for its price, because it was not in good order on its arrival at Belleville, as it appeared that it was purchased and shipped in good condition.

Held, also, that the contract was made in Ontario, and that, therefore, evidence of the custom of brokers at Toledo was properly rejected.

APPEAL from a decree of Blake, V.C., dismissing the plaintiff's bill.

The bill was filed by the plaintiff for the purpose of recovering from the defendants the amount of their acceptance, being the price for certain corn which the plaintiff alleged he had purchased, while acting as a commission agent for them.

The defendants by their answer set up that they had contracted with the plaintiff for the delivery of the corn in good order, at Belleville, and that they had refused to honour their acceptance, as the corn was discovered to be musty and in bad condition on its arrival.

Blake, V.C., before whom the cause was heard, held that the relationship of vendor and purchaser existed between the parties, and dismissed the bill.

The pleadings and facts are further stated in the judgment.

The plaintiffs appealed.

The appeal was argued on the 21st September, 1880 (a).

C. Moss and Machar, for the appellant. The evidence establishes that the appellant acted in the transaction of the purchase of the cargo of corn in question as the respondents' agent, and it should have been held that the cargo was at their risk from the time it was shipped.

(a) *Present*.—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

It is besides conclusively proved by the evidence (and it was conceded by the respondents upon the argument at the trial) that the cargo when shipped was in good order and condition, and was of the quality and description known as Old High Mixed Corn, and therefore the responsibility for any deterioration or alteration in its condition observable upon its arrival in Belleville was not in anywise due to or chargeable against the appellant. Having accepted the draft for the price of the cargo and charges for purchasing, insuring, &c., it was incumbent upon the respondents to resist the appellant's claim upon the draft by proving beyond doubt that the transaction was one of purchase and not an agency transaction, which they utterly failed to do. The learned Vice-Chancellor who tried the cause erred in rejecting the evidence showing the meaning to be attached to the words "delivered," "delivered here," "cost," and other terms used in the telegrams and letters which passed between the parties in relation to the transaction. These terms refer to the cost of the cargo to be laid down at the point of destination, and do not infer a contract to deliver the cargo; in other words, they are, when used by persons dealing as the appellant and the respondents did, merely terms of advice from the agent to his principal as to what the cargo will cost laid down at the principal's warehouse. It was moreover shewn that the term "delivered" is in common use in the grain trade both in the United States and in Canada, to indicate the expense of a cargo to the principal at his warehouse, and that its use in a telegram or letter to a commission agent is construed as an authority to the agent to effect a charter for his principal of a vessel to carry the cargo as well as to purchase the same. In this case the telegrams and correspondence, as well as the parol evidence, shew that the appellant was authorized and instructed by the respondents to purchase on their behalf a cargo of "Old High Mixed Corn," and to charter a vessel to carry the same to Belleville. The cargo was really paid for by the respondents, the appellant not

having advanced any money of his own in order to pay for the same, but the whole price, including commission, insurance, &c., was derived through the draft upon the respondents, which was discounted at the Merchants' National Bank of Toledo, and was accepted by the respondents upon presentation to them. The evidence shews that the alleged heating and deterioration in quality of cargo occurred after its shipment at Toledo, and during the voyage to Belleville; but it is submitted that the appellant, even if a vendor, would not be responsible for such deterioration *in transitu*. Even assuming that the alleged deterioration was due in whole or in part to a defect existing at the time of the shipment, the evidence proves that such defect (if any) was latent, and no warranty of condition can be implied on the part of the appellant, even if he can be regarded as a vendor and subject to a vendor's liabilities. They cited *Ingleright v. Hammond*, 10 Ohio 337, 344; *Lawrence v. McGregor*, Bright's R. 193; *Gazzam v. Ohio Ins. Co.*, Bright's R. 203, 213; *Steamboat Albatross v. Wayne*, 16 Ohio 513; *Coles v. Bristowe*, 17 W. R. 105, L. R. 3 C. P. 112; *Maxted v. Paine*, L. R. 4 Ex. 81, L. R. 6 Ex. 132; *Duncan v. Hill*, L. R. 6 Ex. 255; *Grissett v. Bristowe*, L. R. 4 C. P. 36; *Ireland v. Livingston*, L. R. 5 H. L. 395; *Wool v. Robinson*, 10 Ex. 342; *Davis v. Haycock*, L. R. 4 Ex. 373; *Dicken v. Zizinia*, 10 C. B. 651; *Halton v. Warren*, 1 M. & W. 185; *Addison on Contracts*, 2nd ed., 185; *Story on Agency*, 111.

W. Cassels, and *Ponton*, for the respondents. It was submitted at the hearing, and the evidence shews that when the cargo of corn arrived at Belleville it was unfit for use, and was not of such a quality as complied with the terms of the contract entered into by the respondents. The appellant's contention that he merely purchased as agent for the respondents is not well founded. The contract entered into was one for the delivery of the corn in Belleville at a fixed price. The respondents did not deal with the appellant as agent, nor did the latter act as an agent in the matter. It appears from the evidence that the appel-

lant did not charge a uniform rate of commission, but treated himself as a vendor, and not as an agent, and appropriated for his own benefit the difference between the price paid by the respondents and the price paid to others by the appellant for the purchase of corn. If the appellant acted as an agent in the transaction in question his conduct in this respect was grossly fraudulent. Moreover, it appears that he insured the corn for his own benefit: that the bill of lading was assigned to the National Bank at Toledo: and that the bank forwarded the bill of lading to Belleville with instructions to their agents there that the corn was not to be delivered until the draft was paid. If in point of fact the corn when delivered at Toledo was the property of the respondents, then they would have been entitled to have received the corn on its arrival at Belleville, which would have been several days before the draft fell due, whereas, under the instructions of the bank, the corn would have remained in Belleville under the control and as the property of the appellant and the National Bank for several days until the draft matured. The appellant also acted as the owner of the corn. He and the insurance company had, as the evidence shews, an arbitration as to the amount of damage and loss payable by the insurance company. He acted in this manner without consulting the respondents, and he released the insurance company without the consent and without the authority of the respondents. If the respondents were the owners of the corn and responsible for it, they were entitled to the benefits of the insurance, and the conduct of the appellant in this respect shews clearly that it never was contemplated that he was acting merely as an agent in the matter. Even admitting, for the purpose of argument, which the respondents do not admit, that the appellant acted merely as commission agent, it was his duty to have entered into such a contract on the part of the principal for whom he was purchasing the corn as his instructions required. He had no power to bind the respondents by any other contract than that the corn

should be delivered at Belleville in good order. The evidence as to custom was properly rejected. The contract was a contract made in Belleville, but if it were a contract made in Toledo, the evidence sought to be given was inadmissible, as it was evidence not explaining the contract, but varying it. He referred to *Roger v. Woodruff*, 23 Ohio 732; *Hayes v. Nesbitt*, 25 C. P. 101; *Kirchner v. Venus*, 12 Moo. P. C. 361; *Gilmour v. Supple*, 11 Moo. 560; *Burke v. Blake*, 6 P. R. 261; *Dunlop v. Lambert*, 6 Cl. & F. 622; *McGiverin v. James*, 33 U. C. R. 203.

September 25, 1880. Moss, C.J.A.—The plaintiff might have proceeded at law to recover from the defendants upon their acceptance of a bill of exchange, but he has preferred to file a bill in Chancery. Although no special grounds for equitable interference are shewn, it was the plaintiff's right under our present system to adopt this course.

There may have been some convenience in spreading out upon the record the conflicting views of the parties to the contest, but it is possible that any advantage from this comparative luxuriance of counter statement may have been more than over-balanced by its tendency to obscure the real question in dispute. The bill alleged, with some amplification, that on the 14th of September, 1878, in consideration that the plaintiff at the request of the defendants would purchase for the defendants 13,000 bushels of grain known as Old High Mixed Corn, at Toledo, at such price as would make the cost at Belleville, including freight, commission, and insurance, equal to 47 cents per bushel, and would ship the same by water for account of the defendants, and would draw a bill at ten days for the amount, the defendants promised to pay such bill at maturity. It then alleged a purchase for account of defendants; a shipping on board the *Annandale* to be delivered upon paying the freight of five cents per bushel, and the drawing of a bill for \$5,492, being the purchase money, including cost, commission, and insurance; the present-

ment and dishonour of this draft ; the refusal to accept the cargo on the pretence that it was heated and musty. It next submitted that even if this pretence were well-founded, the defendants were not entitled to refuse to pay their acceptance or to receive the cargo, which had been purchased and shipped by the plaintiff as agent for the defendants in entire conformity with their orders, and that the plaintiff was not therefore liable for deterioration or injury during the transportation. Lastly, it alleged that the plaintiff made repeated ineffectual applications to the defendants to receive and unload the cargo, and being under heavy liability for demurrage, and fearing further deterioration, he at length, after notice, sold to the best advantage, and realized \$3,816. The prayer was for payment of the balance.

The answer is as free from any imputation of needless brevity as the bill. Its more pertinent statements may, perhaps, be thus summarized :—The agreement was that the plaintiff should deliver to the defendants in Belleville, unloaded, 13,000 bushels of Old High Mixed, of prime quality, and in prime order, and the defendants purchased this quantity at the price of 47 cents per bushel, including freight, the expense of unloading not to be borne by them. The cargo was not purchased for account and at the risk of the defendants, but until delivery in proper order at Belleville was to continue to be the property of the plaintiff, and at his risk. The acceptance of the bill was upon the faith of the grain upon arrival proving to be in accordance with the terms of the bargain. Upon examination the corn was found not to be of the quality purchased, nor in good condition, but was heated and musty, for which reason the defendants refused to accept it, or to pay the draft. There was, therefore, no value or consideration. It was also set up in bar of the plaintiff's claim that the corn was not in good condition when shipped.

Upon the last contention I may observe at once, that we need not concern ourselves with any enquiry as to the extent, if at all, to which it met the demand upon the bill, because Mr. Cassels very properly conceded that it was

displaced in fact by the evidence. We have no doubt, on the other hand, that it was established that the grain was not in prime order at the time of its arrival at its destination. Hence it follows (as indeed the accounts of the stormy weather which the vessel encountered on Lake Erie might have led us to suppose,) that the injury to the cargo arose upon the voyage.

Upon these facts it is quite clear that if the plaintiff acted as a mere commission agent, he was not responsible for the deterioration of the cargo, and the defendants were not justified in refusing to receive it, or to pay their acceptance, because it was not in prime order. The plaintiff's duty would then have been discharged by the purchase and shipping in good condition of corn of the proper description.

On the other hand, if the defendants' contention be correct, that it was a condition precedent to their liability that the corn should have arrived in prime order, and been accepted by them, the action must fail, and the bill was properly dismissed. For our present purpose it may be assumed that this is a case in which, although we do not desire to decide the point, such a condition would be implied if the relation between the parties were that of seller and purchaser—not that of principal and agent.

We proceed then to ascertain the true character of the relationship. This must depend upon the proper interpretation of the correspondence. No other communication passed between the parties, and we do not think that any conduct is shewn which could vary its import. One circumstance, however, may be noted. The plaintiff had succeeded to the business of E. R. Williams & Co., of whom he had been an employee, and with whom the defendants had had numerous transactions. This firm had acted exclusively as commission agents, and had never engaged in the business of selling corn on their own behalf. The first piece of correspondence is a telegram from the plaintiff to the defendants in the words: "Schooner Annandale obtainable, 5 c., vessel paying unloading. High mixed cost-

ing 47." It is evident that this message must have been preceded by some enquiry as to the cost of corn in the Toledo market, and it may be that its terms are equally consistent with either theory. On the same day, 13th of September, 1878, the defendants sent this message, the terms of which are of the highest importance: "Do you not think corn will be lower next month? Will you deliver here at 47?" It cannot plausibly be argued that the first question is, what would naturally be expected in a communication addressed to a merchant from whom they proposed to purchase? If the plaintiff were selling or offering for sale his own goods, it was not to him the defendants would look for a safe opinion with respect to a fall in the market.

The latter part of the message standing by itself might be ambiguous. But looking at the context, and bearing in mind that it is the defendants' phrase, its meaning seems clear enough, and consistent with what we shall presently point out as our deduction from the whole correspondence. On the same day the plaintiff replied giving reasons for not anticipating a fall in prices, and adding: "Good shipping demand; offer cargo, 47, cost, freight, commission, insurance, prompt acceptance." On the 14th plaintiff again telegraphed: "13,000 or 16,000, spot, obtainable, vessel paying unloading expenses. Hurry answer." Even at this point the communications, viewed as a whole, appear to us to indicate the relationship of principal and agent, at least it is not inconsistent with that theory of the position of the parties. On the 14th the defendants telegraphed: "Will take 13,000 Old High Mixed, 47, delivered here, vessel paying loading. Draw ten days through Merchants' Bank here. Send prime corn." To which the plaintiff replied: "Telegram received. *Executed order*—limit—loading schooner Annandale—about 13,000." This shews plainly the capacity in which the plaintiff understood himself to be acting. It is inconceivable that the defendants should have then supposed they were dealing with a person selling on his own account. But this

seems to be placed absolutely beyond doubt by two other documents. On the very same day the plaintiff wrote a letter containing this passage: "Telegrams yesterday and to-day have resulted in purchase *for your account* of about 13,000 H. M. Corn (crop 1877) at cost of 47, Belleville." It is not unworthy of note that in this letter he advises them of the state of the market. He also furnished them with a statement, which seems to be in accordance with the usual practice, commencing: "Account purchase by George E. Williams of 12,965 bushels of High Mixed Corn *for account and risk* of Messrs. H. Corby & Sons, 1878. September 14. *Purchased*, 12,965 bush. @ 42 cents." We think that the irresistible deduction from these writings is, that the defendants employed plaintiff to purchase 13,000 bushels of this particular description of corn at a price which, when commission, insurance, freight, and in a word all charges were met, should make the commodity cost them 47 cents at Belleville. To meet this natural interpretation the defendants seek to give great prominence to and lay great stress upon the recurrence of the phrase "delivery," or "delivered." This, it is contended, shews that no liability was to arise until a proper delivery was made at Belleville. Such a construction is opposed to the whole scope of the correspondence, and is inconsistent with the defendants' own conduct in accepting a bill before the cargo had arrived. Why did they accept? They knew that in the ordinary course of dealing it was discounted with a bank to whom the bill of lading was delivered, and indeed it was through this bank that its presentment for acceptance seems to have been made. Will they gravely urge that they expected to pay the bank, and if the cargo was not of proper quality or was in bad condition, to refuse it, and recover from the plaintiff? Some interesting and instructive observations, illustrative of the relationship between parties dealing under similar circumstances, will be found in the opinion of Mr. Justice Blackburn, when advising the House of Lords, in *Ireland v. Livingston*, L. R. 5 H. L. 412.

The plaintiff has contended that the contract is governed by the law of Ohio, and that there is imported into it the usage of corn brokers in Toledo, by which delivery means placing on board the vessel.

We agree with the defendants that this contract cannot be said to have been concluded in Toledo. It falls within the rule laid down in *Adams v. Lindsell*, 1 B. & A. 681, and settled by *Dunlop v. Higgins*, 1 H. L.C. 381. Whether any doubt has been cast upon the length to which these decisions have been commonly supposed to go by the dissenting opinion of Baggallay, L. J., in *Household Fire Ins. Co. v. Grant*, L. R. 4 Ex. D. 216, it is not necessary now to enquire. That learned Judge himself stated that it had been established by a series of authorities, that if an offer is made by letter, which expressly or impliedly authorizes the sending of an acceptance of such offer by post, and a letter of acceptance properly addressed is posted in due time, a complete contract is made at the time when the letter of acceptance is posted, though there may be delay in its delivery. In *Harris's Case*, L. R. 7 Chy. App. 587, 592—James, L. J., explained the effect of *Dunlop v. Higgins* to be “that the posting of the letter of acceptance is the completion of the contract.” In the case of *McGiverin v. James*, 33 U. C. R. 212, upon correspondence not unlike this we have been examining, the contract was held to have been made in this Province. The evidence of custom, therefore, appears to have been properly excluded, but it is not necessary for the plaintiff to seek its support. We think that the intrinsic evidence of the correspondence shews him to have been a mere agent, and the term “delivery” to have been used, not with reference to any obligation on his part to deliver at Belleville, but with reference to the price which it would cost the defendants when it came to their possession. Upon reason and authority we are of opinion that the plaintiff's duty was performed when he saw that the cargo was placed in good order on the vessel, and that he was not responsible for its subsequent deterioration. A point was made of his proceeding to realize upon the

cargo. This, it is urged, was inconsistent with his being a mere agent. But he was an agent having a very substantial interest. He had purchased and paid for the corn out of the proceeds of the draft which the defendants refused to honor. The defendants having peremptorily refused to accept the cargo, his conduct in selling after reasonable notice instead of allowing the grain to become worse, and larger expense to be incurred for demurrage, was that of a prudent man endeavouring to act for the best under embarrassing circumstances.

In the view we take of their position the defendants have reason to feel grateful that his action prevented bad from being worse.

It is charged also that the plaintiff was guilty of improper conduct, amounting in fact to fraud, in including without notice to the defendants a small profit which he is thought to have made beyond the usual commission. From that charge we feel bound completely to absolve the plaintiff. It is true that, as put by Mr. Justice Blackburn, in *Ireland v. Livingston*, L. R. 5, H. L. 408, it would be a positive fraud if, having bought the goods at a price, including all charges, below the maximum limit fixed in the order, the commission merchant, instead of debiting his correspondent with that actual cost and commission, should debit him with the maximum limit. But the facts of this case exonerate the plaintiff from such a charge. The defendants deny all knowledge of the custom, and all they cared about was that the corn should cost them no more than 47 cents. The usual commission, it appears, was one-half per cent. As the freight was five cents it is conceded that a purchase at 41 cents would leave the plaintiff no more than the usual commission. That was the ruling rate on 14th September, and the expectation was, that the plaintiff could procure the stipulated quantity at that price. He so bought about 6,000 bushels, but could not immediately find a seller of the remainder. As he was very anxious to execute the order promptly, as the defendants desired, and as the schooner was wait-

ing, he arranged with one King for the required amount, but King would not agree to accept forty-one cents, while he was willing to leave the price to be settled at a future day. On the Monday, the 16th, the plaintiff, not liking this uncertain state of things, bought enough corn to replace King's. For some of this he paid $40\frac{1}{2}$ cents, and for the rest $40\frac{3}{4}$ cents. Upon this quantity then he made a somewhat larger commission than $\frac{1}{2}$ a cent. But it will be observed that if he had not been able to replace King's corn, and had been compelled to pay him $41\frac{1}{2}$ cents, he would have received no commission upon that quantity. Still further, it would seem that he had actually drawn the bill, when he was still liable to pay King more than 41 cents.

Upon the whole we think that the appeal must be allowed, with costs, and a decree made in the Court of Chancery for payment of the balance due to the plaintiff, with costs. We presume that this amount can be agreed upon or fixed by the Registrar. If not, there must be a reference in the usual manner, the costs of which will be added to plaintiff's claim.

BURTON, PATTERSON, and MORRISON, JJ.A., concurred.

Appeal allowed.

RE BULLIVANT, AN INSOLVENT.

*Insolvent Act of 1875—Discharge—Omission to keep books of account—
Secs. 56 and 65.*

Where an insolvent omits to keep books of account suitable for his trade, he is not entitled to an immediate discharge under the Insolvent Act of 1875, though such failure may not be owing to any improper motive.

In this case, however, as the insolvent had kept certain books, which although imperfect were honestly meant as a business record, his discharge was only suspended for three months.

THIS was an appeal from a judgment of the Judge of the County Court of the county of Lincoln, granting the insolvent an immediate discharge. The facts are stated in the judgment.

The appeal was argued before Moss, C.J.A., sitting in insolvency.

W. Cassels and *McClive*, for the appellant. It is shewn by the evidence that the insolvent omitted to keep account books suitable for his trade, in compliance with sections 56 and 65 of the Insolvent Act of 1875, and he was therefore not entitled to his discharge. Under this clause the question of intent is immaterial, and the Judge took an erroneous view of it in following the English Act of 1869, which allows the Court to consider whether the non-compliance was intentional. They cited *Re Solomon*, 2 N. B. Reg. 285; *Re Newman*, Ibid. 302; *Re Jorey*, Ibid. 668.

J. A. Miller, for the respondent. The duty imposed upon the insolvent by the Act was only to keep books in connection with his business as a market gardener, and, as the learned Judge has found, the statute in that respect has been sufficiently complied with by the books kept by Mrs. Gibson. At all events the evidence shews that any omission in reference to this duty to keep books was not due to an intention to conceal the state of his business, and under such circumstances the Court should not deny him his discharge altogether: *Re Lamb*, 4 P. R. 16; *Re Parr*, 17 C. P. 621.

MOSS, C. J. A.—I have carefully perused the papers in this matter, including the very able judgment of the learned Judge, and I regret that I am unable to concur in the view that the insolvent is entitled to an immediate discharge. I fail to perceive what useful end, either public or private, the appellant deems attainable by opposing the petition. I agree with the learned Judge that there does not appear to be the slightest reason for imputing to the insolvent any fraudulent practice or intent, and it is probable that the loss sustained by the appellant, as mortgagee of certain shares in a steam propeller, is partially due to the cause which principally contributed to the insolvent's failure—the great depreciation in the value of shipping property. But with the motives of the appellant I have no concern. My duty is limited to administering the law according to what I take to be its correct interpretation. The objection to the discharge is, that the insolvent did not keep proper books of account. The facts which are material to the formation of a judgment upon the question are neither numerous nor complicated.

In 1874 the insolvent, who was a farmer and market gardener, owned real and personal estate to the amount of about \$18,000. The gardening business was under the charge and control of Mrs. Gibson, and the insolvent seems to have taken but little personal part in its management. In 1874 the insolvent launched out into extensive enterprizes. He bought land in St. Catharines, upon which he built stores and houses, at a large outlay. He was also induced to take shares in the propeller "City of St. Catharines," which his brother was then building. In order to provide himself with money for these purposes he sold thirty acres of his farm, and executed two mortgages, for \$6,000, and \$2,000, upon the residue of his real estate. He subsequently acquired additional shares in the propeller in exchange, it would seem, for two of his houses. The propeller proved to be a very unprofitable speculation, the cost of construction and out-

fit being much greater than had been expected, and the running expenses in excess of the returns. Further advances in money became necessary, and were procured by the insolvent upon such securities as he was able to offer. The final result was, that he was forced to make an assignment in insolvency, in which assignment he was styled ship-owner and market-gardener. It is conceded that he did not possess such an interest in the propeller as would bring him within the operation of the Act under the designation of ship-owner. Books were kept in connection with the running of the propeller, which contain a proper record of the transactions in that business. The insolvent himself kept no books of any description, but he produced some very informal account-books in which Mrs. Gibson had been accustomed to make entries in relation to the gardening business. The contestant objected that the insolvent had not kept a cash-book shewing his own receipts and expenditures, and that he had kept no account of the large sum of money which passed through his hands in connection with his building enterprise, and his dealings in the shares of the steamer.

The learned Judge was of opinion that the accounts kept by Mrs. Gibson sufficiently satisfied the requirements of the statute with respect to that business, and that there was no obligation to keep any cash-book showing the general receipts and disbursements in other transactions. The provision of the Insolvent, (sec. 56 and 65), upon this subject is very emphatic, for it is declared that the insolvent shall not be entitled to his discharge if he has not kept an account-book shewing his receipts and disbursements of cash, and such other books of account as are suitable for his trade. It is urged that the learned Judge placed an erroneous interpretation upon this provision by holding that the failure to keep the prescribed books might be wholly condoned, if it appeared that it was not the result of any fraudulent intent. I do not gather from the report of his judgment that his Honour entertained such an opinion. He does refer to the fact that the insolvent had

not been proved guilty of any fraud, but, as I understand it, he does not intend to treat this as an excuse for not keeping books. Such a construction would be contrary to the whole policy of the enactment.

The obvious intention of the Legislature was to exclude from the benefit of a discharge in insolvency any person who from any cause failed to keep proper books of account of his trade, and especially a cash-book. Of course the law is not so unreasonable as to expect every one engaged in trade to keep books with finished skill. But he ought to keep in the connected form of a book or books such a record and exhibit of his business transactions as will enable his creditors to form a correct estimate of the condition of his business at a given time. If from ignorance or carelessness he disregards this plain duty, he is liable to have his discharge refused, no matter how innocent he may have been of any fraudulent intention or improper motive. This rule was judicially established for the protection of creditors long before there was any express enactment upon the subject. For example, in *Re Carter*, Fonblanque, 83, the learned Commissioner emphatically laid down the rule that the existence of a cash-book properly kept is a *sine quâ non* for granting an immediate certificate; and that it was not sufficient that such a book might then be made up from a diary, but that the accounts should have been regularly kept, so as to satisfy creditors by an inspection of the books, without referring to other sources. Similar doctrines have been enforced in the United States, in applying an enactment which does not expressly enjoin the keeping of a cash-book, but simply declares that a discharge shall not be granted, if the bankrupt, being a merchant or tradesman, has not kept proper books of account.

It is indeed extremely obvious that sound policy requires the courts not to relax unduly a rule which is so essential to the proper conduct of business. But there are degrees of culpability in this as in other departures from the exact requirements of the law. While some penalty must be inflicted upon him who neglects, from any cause,

to keep a reasonably satisfactory cash-book, the plainest dictates of justice point to less severity where corrupt or fraudulent motives do not exist. While the Courts have emphatically declared that such negligence is a serious dereliction of duty, to be visited with exemplary punishment, they have not failed to throw extenuating circumstances into the balance. The cases of *Re Lamb*, 4 P. R. 16, and *Re Parr*, 17 C. P. 621, referred to upon the argument furnish excellent illustrations of the application of these doctrines, although from the different language of the statute with which they were dealing they cannot be regarded as precise authorities.

In accordance with these views, I think it will be quite sufficient if the issue of the discharge be suspended for three months. I desire, however, that it should be understood that the case is thus leniently dealt with, because the insolvent is free from any improper motive, and because the gardening business, which alone rendered him liable to be placed in insolvency, was of very small extent, and because in respect of it books were kept, which, however imperfect, were honestly meant as a business record.

Appeal allowed.

RE GOODING, AN INSOLVENT.

Insolvent Act of 1875—Omission to keep proper account books—Discharge,
secs. 56, 65.

Under secs. 56 and 57 the Insolvent Act of 1875, a Judge has no power to grant an insolvent his discharge, where he has failed to keep a cash book and account books suitable for his trade, even although such omission may not be due to any fraudulent intention.

THIS was an appeal from an order of the Judge of the County Court of the County of York confirming a deed of composition and discharge, where the insolvent kept no books of account.

The case was argued on the 1st of October, 1880, before Moss, C. J. A., sitting in insolvency.

Reeve, for the appellant. The learned Judge had no power under secs. 56 and 57 of the Insolvent Act of 1875 to take into consideration the excuse that the insolvent's omission to keep proper books of account was not fraudulent. The failure to keep such books being established, the learned Judge was absolutely without any discretion in the matter, and he should have refused to confirm the discharge. In this respect the Act of 1875 differs from the statute of 1864, which gave the Judge a discretion in such a case. He cited *Gilbert v. Girouard*, 2 Pugsley 148.

Schoff, for the respondent. It is submitted that the sections referred to conferred a discretion on the learned Judge, which he has properly exercised, and with which the Court will not interfere. He cited *Re Lamb*, 4 P. R. 16; *Re Solomon*, 2 N. B. Reg. 285.

October 14, 1880. Moss, C. J. A.—The insolvent carried on business in a small way as a brickmaker, but although his operations extended over a little more than a year, he managed to contract a very considerable number of debts, many of them of small amount, but in the aggregate reaching nearly \$3,000, according to the statement which

he furnished of his liabilities. He estimated his original capital at \$700 or \$800, but according to his schedule this had become reduced to less than \$350, and there were secured creditors quite sufficient to exhaust the assets. He proposed a deed of composition and discharge providing for the payment of ten cents on the dollar, which was accepted by nearly all the creditors.

Being examined by the opposing creditors on his petition for confirmation, he deposed that he kept no books whatever: that he had cards and put down the work: that he employed no one to keep books; and that he "marked down things" on a board on which they put bricks, apparently to assist his memory until some particular transaction was closed, or as a slate might be used for calculations. He added that he was no scholar, but it is to be observed that he writes his name very fairly. It is not pretended that he kept any record of cash received or disbursed.

It is said that the learned Judge's ground for granting the discharge was the insignificant character of the business, and the absence of any fraudulent or improper intent on the part of this comparatively ignorant man.

The learned counsel for the opposing creditors argued that these were elements which could not properly operate upon the judicial mind; and that where the insolvent had brought himself within any of the classes of conduct punishable under section 56, it was the imperative duty of the Judge to refuse the confirmation. The exercise of discretion, it was urged, is limited to cases falling within the 57th section.

The language of the former section is very strong and positive. It enumerates several acts and defaults, one of which may be, or will be, fatal to the success of the insolvent's petition. Its bearing upon the present question will be more directly perceived by selecting and putting together some of these. It enacts that the insolvent shall not be entitled to a confirmation if it appears to the Judge that he has been guilty of fraud or fraudulent preference, *or* of fraud or evil practice in procuring the creditors' consent or

execution of the deed, *or* of fraudulent retention and concealment of some portion of his estate, *or* that he has not kept an account book shewing his receipts and disbursements of cash, and such other books of account as are suitable for his trade. Emphatically as this language seems to forbid the granting of a discharge where there has been an offence against its provisions, it might have been argued—I do not say successfully—that it only prevented the insolvent from obtaining an immediate discharge, leaving it to the Judge to impose the fitting penalty. But this interpretation seems to be absolutely excluded when in connection with it is read the following section. It enacts directly that the Judge, upon hearing the application, shall have power to make an order either confirming or annulling the discharge according to the effect of the evidence adduced; but up to this point in the legislation he has not been invested with any authority to suspend the operation of the discharge or declare the discharge to be of the second class. His simple duty would have been to determine whether or not the insolvent had violated any of the provisions of the preceding section, and according to the result to grant or refuse confirmation. Then there comes by way of proviso the additional power, that if the evidence should be insufficient to sustain any of these grounds for contesting the confirmation (which evidently means for procuring its absolute refusal), but it should nevertheless be established that the insolvent had been guilty of minor and less serious misconduct, as, for example, extravagance in his expenses, recklessness in endorsing, or continuing his trade unduly after he believed himself to be insolvent, the Judge may order the suspension of the operation of the discharge, or may declare it to be of the second class. Among these minor defaults is included “negligence in keeping his books and accounts.” Such a survey of the legislation seems to me to compel the conclusion that where there has been a violation of the 56th section the Judge cannot consider extenuating circumstances, and his discretion only arises when the proviso in the 57th section comes into play.

I had occasion in *Re Bullivant*, ante p. 638, to consider the obligations which a man in business has to his creditors in regard to keeping books of account. The precise question now before me did not then arise, because the insolvent had had books kept after a certain fashion, and the learned Judge being of opinion that the books were all that could be reasonably required in the insolvent's business, had granted an immediate discharge. In this opinion I did not concur. I thought it must be dealt with at the least as a case of negligence in keeping books, and I therefore suspended for a short time the operation of the discharge. In the course of my remarks I pointed out that the intention of the Legislature was, to exclude from the benefit of a discharge in insolvency any person who, from any cause and without any fraudulent motive, fails to keep proper books of account, and especially a cash book. I have reconsidered the question with the aid of Mr. Reeve's very clear analysis of the various sections of the Act, and my original view is confirmed.

It is, therefore, my duty to allow this appeal, and to vacate the order of confirmation.

Appeal allowed.

RE MARTIN AND ENGLISH, INSOLVENTS.

Insolvent Act of 1875—Causes of insolvency—Omission to state under section 17.

The insolvent swore to an affidavit verifying the statement of liabilities and assets, but inadvertently omitted the statement of the causes to which he attributed his insolvency, which, however, he made verbally at the first meeting of creditors, where the contestant was present. This defect was not pointed out for more than a year, and after the discharge had been applied for, and the insolvent then swore to another affidavit supplying the omission.

Held, reversing the decision of the Judge of the County Court, that the omission to furnish the statement within seven days from the assignment under section 17, was immaterial, as it expressly gave the right to correct or supplement the statement, which had been done.

Held, also, that under sec. 57, the omission complained of would not disentitle the insolvent to his discharge, as it was not wilful.

Held, also, that under the circumstances, more fully set out below, the opposing creditor was estopped from objecting to the omission.

THIS was an appeal from a decision of the learned Judge of the County Court of Peterborough, refusing, to grant the insolvents a discharge under the 65th section of the Insolvent Act of 1875.

It appeared that the insolvent English, who made the affidavit verifying the statements of liabilities and assets, inadvertently omitted the statement of the causes to which he attributed the insolvency; and on that ground the learned Judge held that he was not entitled to his discharge.

The facts are further stated in the judgment.

The case was argued on the 1st October, 1880, before Moss, C. J. A., sitting in insolvency.

Marsh, for the appellant. The learned Judge took a wrong view of section 17 of the Act, as amended by 40 Vict. ch. 41, sec. 3, in dealing with this case. When properly read, it will be seen that the section only requires two statements, one shewing the liabilities, and the other the assets, which is also to contain an account of the causes

which produced the insolvency. It is provided by the section that either of these statements may be amended, and the appellant was therefore entitled to supply the omission complained of, which he did so soon as it was brought to his notice. We, however, further contend that the period of seven days mentioned in the section is not mandatory. The meaning is, that the insolvent shall have seven days to make the statement; but at the expiration of that time he may be compelled to make it: *Rex v. Lowdale*, 1 Burr. 435; Insolvent Act of 1875, sec. 140; *Pierce v. Morris*, 7 A. & E. 96; *Wolcott v. Wigton*, 7 Ind. 44. Sections 56 and 57 shew that the omission in question was no ground for refusing to confirm the discharge, as the evidence does not prove that the insolvent was "wilfully in default." If the assignee had examined the appellant upon oath at the first meeting, as he should have done, his statements as to liabilities and assets, including the causes of his insolvency, would have been upon oath, and the statute thus strictly complied with. The cases of *Re Thomas*, 15 Gr. 196, and *Hood v. Dodds*, 19 Gr. 644, shew that under such circumstances the failure of the assignee to perform his duty should not prejudice the insolvent. By accepting the composition, with full means of knowledge, the respondent is estopped now from taking the objection.

Edmison, for the respondent. The case of *Re Thomas*, cited by the appellant, was decided under the Act of 1869, and is inapplicable to our law as it now stands. The assignee then had to prepare the papers. Section 65 imperatively declares the discharge shall not be confirmed unless the insolvent has complied with all the provisions of the Act, and in this case he has clearly not complied with section 17. Not only was the statement required by it not made within the seven days, but the amended statement is wholly insufficient as an account of the causes to which the appellant attributes his insolvency: *Re Moore*, 5 L. T. N. S. 806; *Re Tyrie*, 13 W. R. 953. The statement cannot be made after the expiration of the seven days.

October 14, 1880, Moss, C. J. A.—The appellants were placed in insolvency under a writ of attachment, issued on the 30th June, 1879. The liquidation of the estate proceeded in due course, and resulted in the payment to the creditors of a dividend of 63 cents on the dollar. Martin was prevented by illness from attending the first meeting of creditors, which was held soon after the issue of the writ, and indeed if he had been present he would not have contributed any additional information to that given by English, who had the charge of the finances and the general management, while Martin was principally engaged in peddling their wares through the country. He, however, attended the second meeting, which so far as I can gather was the only other one held. English was present at both meetings, prepared to give all explanations and to answer all questions proposed to him touching their estate and affairs. At the first meeting he made a statement of their assets and liabilities, which appeared to be satisfactory to the creditors. He also stated the causes to which he attributed the insolvency and deficiency of assets. He then swore to an affidavit, verifying the statements of liabilities and assets, believing, as he now deposes, that the latter contained a statement setting forth in substance what he had stated to the meeting as to the causes of the insolvency and the deficiency of the assets to meet the liabilities. It now appears that although the affidavit had annexed to it a schedule with the appropriate heading, the body of this schedule was left vacant. It is sworn, and there is not the least ground for impugning the truth of the assertion, that this was through inadvertence, and not through fraud or for any fraudulent purpose. The omission of this statement, or probably it would be more precise to say the failure to include in it the causes of the insolvency, is now made an objection to the discharge by Mr. W. J. Hall, a creditor. When Mr. Hall first discovered this slip is not shewn, but it is quite certain that he did not divulge it until the application for the discharge was made. Upon its being made known the insolvents swore to another

affidavit giving these particulars. This is objected to as not giving a sufficiently full, clear, and specific account, its language being too vague and general, as for example: "Insufficient capital, want of which caused temporary embarrassment, and the inability to collect debts or realize upon their assets at the particular season of the year in which the proceedings in this matter were instituted." Without expressing any opinion upon the question of whether similar statements should, as a general rule, be deemed sufficient, it is safe to say that the objection ought not now to be heard at the end of more than a year, during which there was the amplest opportunity of fully examining the insolvents.

The learned Judge grounded his opinion upon the considerations that the 17th section of the Act makes it imperative upon the insolvents to furnish a statement within seven days, and that the 65th section enacts that whether such application be contested or not it shall be incumbent upon the insolvent to prove that he has in all respects conformed himself to the provisions of the Act. Hence in his opinion it followed that if there was a failure to make such a statement within seven days from the date of the assignment, the insolvent could not obtain the relief granted by the Act. The learned counsel for the opposing creditor was obliged to concede that this was the only logical result of the decision reported to this Court. Before the provisions of the Act are construed as inflicting a punishment so wholly disproportionate to the gravity of the offence, and so utterly repugnant to the sense of natural justice, the Court ought to be satisfied that the Legislature has spoken with no uncertain voice, and that its language is so express that we can only obey and wonder. If any other conclusion can be extracted without distortion of the language used, or the assignment of unreasonable and unlikely significations to words, it ought to be preferred.

But I do not think that it is necessary in this case to put any extraordinary—still less any strained—construction upon the provisions of the Act to demonstrate the

unsoundness of the extremely strict reading which it has received. Nor need the appellants rely upon the rule for which *Rex v. Loxdale*, 1 Burr. 445, is cited, that the precise time in many cases is not of the essence, although I think this is decidedly a case in which such a rule might be applied. The just reading of the 17th section seems of itself to meet the objection. That section does not require three statements, but only two. The first is a statement of liabilities; the second of assets, and this latter is to *include* the account of the causes to which insolvency is attributed. The account, therefore, which was omitted here should have formed a part of the statement of assets. Now the section expressly gives the insolvent the right to correct or supplement either of the statements, and in my opinion this carries with it the right to add an account of the causes of insolvency. Such an addition is no more than the correction of an erroneous statement. I think, therefore, that if the giving of such an account was necessary under the actual circumstances of this case, the mere fact that it had not been given within the seven days was wholly immaterial.

But I go farther, for I do not think that after what has occurred this creditor should now be permitted to urge this objection. He heard the statement made by the insolvent English before the creditors on behalf of himself and his partner; he seemed to be satisfied with its sufficiency; he had ample opportunity of obtaining an explanation of all their dealings under oath; his claim was so large as naturally to make him watchful; he may well be assumed to have scrutinized the affidavit at the time when the insolvency was fresh; he does not pretend now that he was deceived, but rests upon the technical failure to comply with the strict requirements of the Act; he waits until after the assets have been realized and his dividend been paid, and then for the first time springs this objection. I do not know when he first learned of its existence, but I should be unwilling to attribute to any respectable person such an ethical view as would permit him, after

discovering the defect at the time, and after having heard the statement to the creditors which, coupled with the very form of the affidavit, proved that it was the result of oversight, to remain quiescent with the intention of taking advantage of it afterwards. If he only discovered it, just before bringing it forward, he shews how little importance he attached to the information to which it is now urged he was entitled.

There is still another ground upon which I am strongly inclined to think that the decision is erroneous. The 65th section authorizes a creditor to oppose the granting of a discharge upon any ground upon which confirmation may be opposed, and it can hardly be thought that the insolvent is required to prove more when his application is unopposed, than when a creditor is contesting it. Looking at the 56th and 57th sections of the Act, it appears to me that the omission complained of would not be an objection, unless the insolvent were "wilfully in default." Apart from any right to file the statement in question although the seven days had expired, I cannot conceive that the Legislature intended to allow the defeat of an honest and innocent insolvent upon such a technical ground :

The cases cited on behalf of the creditor do not support his position. In *Hood v. Dodd*, 19 Gr. 644, the point did not arise for adjudication, and the general language of the learned Judge must be read in the light of the actual circumstances. I quite concur in the views expressed by Mr. Commissioner Holroyd in *Re Moore*, 5 L. T. N. S. 806, and *Re Tyrie*, 13 W. R. 953, upon the necessity of insolvents being careful and accurate in their preliminary statements, and his warnings against considering them as light and trifling things. But they do not furnish precedents upon the point with which I am now concerned. In each case the question arose upon the 93rd section of the Bankruptcy Act of 1861, which allowed a debtor himself to petition that he might be adjudicated bankrupt. That section required every debtor petitioning against himself to file a full, true and accurate statement, verified by oath, of his debts and liabilities of every kind, and of the

names and residences of his creditors, and of the causes of his inability to meet his engagements, within such time and in such form as general orders should direct. General Order No. 4 required it to be in the form specified in the schedule, and declared that if such statements should not be so filed and verified the petition should be dismissed. Such a statement seems, therefore to have been a condition precedent to the *status* of bankrupt. Without it a debtor showed no right to petition against himself. Now in *Re Tyrie* the debtor had in the schedule annexed to his petition omitted one large claim of about £1,200, and had inserted an item of "about £500." It was held that this statement being neither true nor accurate, and there being no reason for the omission in the general statement, the petitioner had shewn no right to be adjudicated bankrupt. *In re Moore* the point was precisely similar, although it did not arise until the sitting for the last examination and discharge. The bankrupt had omitted a debt amounting to one-third of all the claims against him, alleging that he had always considered it as a gift and not as a loan. The Commissioner was of opinion that the bankrupt could hardly have imagined the money was given to him, as he had made a payment on account. In other words, he treated it a case of deliberate omission.

I have anxiously considered whether I ought to remit the case to the Court below in order to give the opposing creditor the opportunity, if he desired it, of investigating the propriety of the insolvent's conduct in other respects, and I have arrived at the conclusion that to do so would be an unwise discretion. There is no trace of a foundation for such a charge before me : nothing of the sort was formulated before the Judge ; I have only the suggestion of counsel that the creditor desires such an opportunity, and believes that he could substantiate some charge. I think it is rather late for him now to seek that position.

In view of all that appears before me, I think I ought to allow the appeal, with costs, and direct the discharge to issue.

Appeal allowed.

TROUT ET AL. V. MOULTON.

Promissory note—Double stamps—42 Vic. ch. 17 sec. 13.

The plaintiffs refused to purchase a note from the holder, one C., because it was insufficiently stamped, whereupon C. affixed double stamps and transferred it to the plaintiffs, who did not notice that the stamps had not been properly cancelled until some time afterwards, when they at once double stamped it and cancelled the stamps under 42 Vic. ch. 17 sec. 13, D.

Held, reversing the decision of the County Court, that the plaintiffs, having taken the note in the full belief that it had been properly double stamped by C., who was at the time the holder, were entitled to double stamp it under the above section, upon discovering the defect.

APPEAL from the County Court of Grey.

This was an action upon three promissory notes, upon which the plaintiffs obtained a verdict. Subsequently the learned Judge made absolute a rule *nisi* to reduce the verdict by \$35.80, the balance due on one of the above notes, which the plaintiffs had purchased from one Carson, on the ground that the plaintiffs had acquired knowledge that the note was not properly stamped, either before or at the time they purchased it, and had not immediately double stamped it.

From this decision the plaintiffs appealed.

The facts sufficiently appear in the judgment.

The case was argued on the 10th November, 1880 (*a*).

Bethune, Q. C., for the appellants. Section 13 of 42 Vic. ch. 17, D., was intended to meet just a case as this, and the appellants have clearly brought themselves within its protection by double stamping the note when they discovered the defect. It was shewn by the evidence that the appellants thought that it was properly stamped when they took it. The learned Judge says that they omitted to cure the defect through their own negligence, but in every case of the kind where a mistake of this nature is

(a) *Present*.—BURTON, PATTERSON, and MORRISON, JJ. A.

made there is negligence. It is clear that there was no attempt to defraud the revenue. He cited *Imperial Bank v. Beatty*, 4 App. R. 228; *House v. House*, 24 C. P. 526; *Third National Bank v. Cosby*, 43 U. C. R. 58; *La Banque Nationale v. Sparks*, 2 App. R. 112.

Kerr, Q. C., for the respondents. The appellants are not entitled to take advantage of section 13, as the learned Judge has found that they were aware of the defect when they purchased the note, and it was their duty then to see that the double stamping was properly done. He referred to *Boustead v. Jeffs*, 44 U. C. R. 255; *Hoffman v. Ringler*, 29 U. C. R. 531.

December 20, 1880. BURTON, J. A.—It seems to have been assumed at the trial and on the argument before us that the plaintiffs had, after becoming holders of the note, the validity of which was in question, attempted to cure the defect by double stamping at that time, and it was urged that having carelessly omitted then to cancel the stamps in the manner provided by law, they could not subsequently, on that omission being pointed out to them, cure this second defect by again affixing and cancelling double stamps. If those had been the facts it is quite possible that the defendant's contention must have prevailed, but I do not so understand the evidence. It would seem to be uncontradicted that when the note was at first offered by Carson to the plaintiff Trout he refused to take it, because it was either not stamped or defectively stamped, but agreed to take it on that defect being removed, and that Carson then double stamped it, although it would appear not in the mode prescribed by the Statute, the date of the affixing the stamps being omitted. In this state it was transferred to the plaintiffs' bookkeeper, and it was not until some time subsequently that the plaintiffs themselves discovered that the stamps so affixed had not been properly cancelled, and they immediately remedied it by double stamping.

The mistake that has been made is in supposing that the

plaintiffs when they acquired the note affixed double stamps, but not in the way to satisfy the Statute.

In point of fact they appear to have taken the note in the full belief that the law had been complied with, and when they subsequently discovered their error they paid the double duty. There is no pretence for imputing any intention to defraud the revenue, the duty having been four or five times paid, and I entertain no doubt if this view of the case had been presented to the Judge he would have come to a different conclusion. The verdict should be reinstated, and this appeal allowed with costs.

PATTERSON, J.A.—The plaintiffs had a verdict for \$144.99, being the amount due on three promissory notes of the defendant, which the defendant had leave to move to reduce by deducting \$35.80, the balance of one of the notes which had been originally for \$65, and which the plaintiffs had bought from one Carson. The objection was, that the note had not been properly stamped, and had not been double stamped in due time. The learned Judge of the County Court made absolute a rule to reduce the verdict, and the plaintiffs have appealed from that decision.

I gather from the report of the evidence that the note when produced at the trial bore double stamps, properly cancelled by the plaintiffs; and the question was, whether they had been affixed and cancelled in sufficient time to satisfy the Act 42 Vic. ch. 17 sec. 13 D., which requires it to appear that the holder of the note when he became such holder had no knowledge of its not being then properly stamped, and that he paid double duty by properly stamping it so soon as he acquired such knowledge; and if it shall appear that it was through mere error or mistake, and without any intention to violate the law on the part of the holder, that the defect existed.

It appears from the evidence of the plaintiff Trout and of Carson that the negotiation for the purchase of the note from Carson was conducted by the plaintiff Trout and Carson at the plaintiffs' office, to which Carson had come

at the request of Trout, who had an object in procuring this note : and that it was then discovered that the note had been insufficiently stamped, if stamped at all. Nothing is said to indicate that up to this time Carson had been aware of the defect. For all that appears Carson was in a position to cure the defect by double stamping, and whether this was so or not, there is no suggestion that Trout had any reason to suppose that Carson could not then effectually do so. Trout then told Carson that it was necessary to double stamp the note, and Carson then affixed the double stamps, but he neglected to cancel them by marking on them the date and his initials. This omission was not noticed by Trout, who supposed the stamps had been properly cancelled until some time afterwards, when his attention was called to the matter by his attorney, whereupon he promptly double stamped it, as it appeared at the trial.

The unavoidable result of the evidence seems to me to be, that the note still belonged to Carson when his ineffectual attempt to restamp it was made. The plaintiff Trout required Carson to stamp it, and the omitted initials were not those of the plaintiff's but those of Carson, who should, as being then the holder, have cancelled the stamps. The plaintiffs did not become the holders until Trout supposed the defective stamping had been cured. When they became the holders therefore they had no knowledge of any defect, and as soon as they discovered the defect they applied the remedy. They seem to come distinctly within the saving operation of the thirteenth section. There is no room to attribute to them any intention to violate the law, or to ascribe the existence of the defect to anything but error and mistake on their part in assuming that Carson had cured the defect while he was still the holder.

The attention of the learned Judge does not seem to have been directed to the circumstance that Carson was still the holder when the omission was made. No doubt the plaintiffs might with diligence have ascertained as soon as they became holders of the note that it required further

or more formal payment of duty, but the Statute affixes the penalty to default after actual knowledge, not to omission to use the means of acquiring knowledge.

I do not doubt that if this view had been presented in the Court below the learned Judge would have left the verdict undisturbed.

I agree that we must allow the appeal, with costs.

MORRISON, J.A., concurred.

Appeal allowed.

A DIGEST
OF
ALL THE REPORTED CASES
DECIDED IN
THE COURT OF APPEAL,

FROM JANUARY 14TH, 1880, TO DECEMBER 20TH, 1880.

ADMISSION.

On policy of receipt of premium.]
—See INSURANCE, 2.

ALLOTMENT.

Proof of.]—See CORPORATION, 1.

AMENDMENT.

At trial by striking out items from particulars.]—See COUNTY COURT.

APPEAL.

Proof Court—New trial on matter of discretion—Costs.]—Although the jurisdiction of the Court of Appeal is not limited in appeals from the County Court as it is in appeals from the Superior Courts, under sec. 18, sub-sec. 3, of the Appeal Act, it will not in ordinary cases interfere where a new trial has been refused by the County Court upon a matter of discretion only.

In this case, however, being an action for assault against a public officer, in which the jury had found a verdict for \$100, and a new trial,

asked for on the ground that the verdict was against evidence, was refused, the Court of Appeal granted a new trial, as the evidence strongly preponderated in the defendant's favour and there was reason to believe the jury had been misled by the charge.

As the judgment was varied on a matter of discretion, no costs of appeal were given. *Campbell v. Prince* 330.

See ARBITRATION AND AWARD, 1.

ARBITRATION AND AWARD.

1. *Award—Motion to set aside—Time for moving.]—On the second of December, 1878, the submission being within the 9 & 10 Wm. III., the plaintiff moved to set aside an award made on the 13th, of August previously, accounting for his delay on the ground that the defendant had, on the 4th of September, before the end of the next Term, served a notice on him of his intention to appeal. It was not, however, sworn that he refrained from moving owing to this notice.*

Held, reversing the decision of PROUDFOOT, V. C., that, the evidence did not shew that the delay was induced by the defendant, but that even if it had, it would have been no excuse for the delay, and the motion was refused. *Pardee v. Lloyd*, 1.

2. *Award—Specific performance of—Misconduct of arbitrators—Right of review under 38 Vic., ch. 15 O.*—*Held*, affirming the decree of PROUDFOOT, V. C., that the plaintiff was entitled to specific performance of an award giving him damages for his lands taken by the defendants; that the sum awarded was not so excessive as to shew any fraudulent or improper conduct on the part of the arbitrators; and, *Quere*, whether, if shewn it would be a defence in such a proceeding. *Norvall v. Canada Southern Railway Co.*, 13.

3. *Arbitration—Verbal appointment of arbitrators—Making submission a rule of Court.*—The plaintiff and defendant agreed in writing to submit certain matters in dispute to an arbitrator, to be selected by a person named in the submission, who subsequently appointed the arbitrator verbally.

Held, per PATTERSON and MORRISON, JJ.A., affirming the judgment of OSLER, J., 30 C. P. 466, that the fact that the arbitrator was verbally appointed did not prevent the submission from being made a rule of Court.

Per BURTON, J.A., and ARMOUR, J., that the appointment not being in writing, it was a parol submission and could not be made a rule of Court, *Cruickshank v. Corbey*, 415.

Arbitration of questions arising between members of incorporated Society.—See CORPORATION, 2.

See INSURANCE, 7. — CONSTITUTIONAL LAW.

BANKRUPTCY AND INSOLVENCY.

Insolvent Act of 1875—Fraudulent mortgage—Evidence—Burden of proof.—The bill was filed by the assignee in insolvency of one T., to set aside a mortgage given by him shortly before his insolvency, alleging that the defendant T. N., who was endorser of a note for \$2,000 made by T., procured the mortgage in question for that amount to be made in the name of his brother J. N., and that he gave J. N., the \$2,000 with which the note was retired. T. N. swore that he paid J. N. the money in discharge of a debt due by him to J. N. and P. N., another brother. J. N. also swore that the mortgage moneys belonged to him and P. N., but their evidence was uncorroborated, and P. N. was not called.

Held, reversing the decree of PROUDFOOT, V. C., that under the suspicious circumstances which surrounded this case, the *onus* was wholly upon the defendants, to prove not only that a debt was due from T. N., J. N., and P. N., but that the money received by them in payment thereof had been honestly advanced to T. on the security of the impeached mortgage, which the evidence, more fully set out below, failed to establish.

The rule laid down in *Merchants Bank v. Clarke*, 18 Gr. 594—that transactions of this kind should not be held sufficiently established by the uncorroborated testimony of the parties thereto—approved of. *Morion v. Nihan*, et al. 20.

2. *Insolvent Act, 1875—Power of assignee to avoid chattel mortgage.*—*Held*, affirming the decision of the County Court, BURTON, J. A., dissenting, that the assignee of an insolvent mortgagor can, for the benefit of creditors, impeach a chattel mort-

gage for non-compliance with the Chattel Mortgage Act. *Re Barrett, an Insolvent*, 206.

3. *Insolvent Act of 1875—Payment of taxes.*—Upon the insolvency of the lessees, there were goods upon the premises belonging to them, and other goods stored with them, sufficient to pay the taxes in arrear; and a warrant being issued, the bailiff notified the assignee, but forbore to distrain on the assignee's promise to pay, which promise was confirmed by the inspectors of the estate. The goods having been afterwards removed, an order was made directing the assignee to pay the taxes forthwith, with all costs. *In re Bowes, Insolvents*, 353.

4. *Promissory note—Indorsement by payee after insolvency.*—The payee of a promissory note made and payable in Ontario, who had absconded to Michigan, while there and after a writ of attachment in insolvency had issued against him in Ontario, endorsed the note for good consideration to the plaintiffs, who took it *bona fide*.

Evidence was given to prove that by the law of Michigan the indorsement was sufficient to pass the note to the plaintiffs.

Held, reversing the judgment of the County Court, that the plaintiffs could not recover, as the title to the note had vested in the assignee before the indorsement, and that his rights thereto could not be affected by the law of Michigan. *Jenks et al v. Doran*, 558.

5. *Insolvent Act of 1875—Discharge—Omission to keep books of account—Secs. 56 and 65.*—Where an insolvent omits to keep books of account suitable for his trade, he is not entitled to an immediate discharge under the Insolvent Act of 1875,

though such failure may not be owing to any improper motive.

In this case, however, as the insolvent had kept certain books, which although imperfect were honestly meant as a business record, his discharge was only suspended for three months. *Re Bullivant, an Insolvent*, 638.

6. *Insolvent Act of 1875—Omission to keep proper account books—Discharge, secs. 56, 65.*—Under secs. 56 and 57 of the Insolvent Act of 1875, a Judge has no power to grant an insolvent his discharge, where he has failed to keep a cash book and account books suitable for his trade, even although such omission may not be due to any fraudulent intention. *Re Gooding, an Insolvent*, 643.

7. *Insolvent Act of 1875—Causes of insolvency—Omission to state under section 17.*—The insolvent swore to an affidavit verifying the statement of liabilities and assets, but inadvertently omitted the statement of the causes to which he attributed his insolvency, which, however, he made verbally at the first meeting of creditors, where the contestant was present. This defect was not pointed out for more than a year, and after the discharge had been applied for, and the insolvent then swore to another affidavit supplying the omission.

Held, reversing the decision of the Judge of the County Court, that the omission to furnish the statement within seven days from the assignment under section 17, was immaterial, as it expressly gave the right to correct or supplement the statement which had been done.

Held, also, that under sec. 57, the omission complained of would not

disentitle the insolvent to his discharge, as it was not wilful.

Held, also, that under the circumstances, more fully set out below, the opposing creditor was estopped from objecting to the omission. *Re Martin and English, Insolvents*, 647.

Insolvent Act of 1875—Discharge under.—*Held*, that the insolvents were not entitled to a discharge under sec. 65 of the Insolvent Act of 1875, as the facts set out below did not shew that their failure to pay a dividend of fifty cents in the dollar was caused by circumstances arising more than one month after the mailing of the declaration of insolvency, for which they could not be justly held responsible within the meaning of the third proviso to that section.

Quære, as to the effect of neglecting to mail such declaration to each creditor, as required by that section. *In re Galbraith and Christie*, 358.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Promissory note—Accommodation endorser—Innocent holder.*—B. endorsed a promissory note made by C. for the purpose of retiring another similar note which he had previously endorsed for C.'s accommodation, and gave it to C. Instead of retiring this note, however, C. handed it to the plaintiff in payment of a debt, who took it in good faith, but made no inquiry respecting C.'s title to the note or his authority so to deal with it.

Held, affirming the judgment of the Queen's Bench, 43 U. C. R. 599, that the plaintiff was entitled to recover against B. *Cross v. Currie et al.* 31.

2. *Promissory note—Death of indorser—Notice of dishonour*—37 Vic. ch. 47, sec. 1, D.]—The plaintiffs dis-

counted at a bank a note endorsed to them by S. Subsequently S. died, leaving the defendant his executor, who proved the will before the note matured. The bank, being unaware of the death of S. addressed a notice of protest to S., at the place where the note was dated, no other address having been given by him. The plaintiffs, who knew of S.'s death before the maturity of the note, took it up, and sued the defendant, without having given him any notice of dishonour.

Held, per BURTON and PATTERSON, JJ.A., affirming the judgment of the Q. B., 45 U. C. R. 32, that even if the notice was sufficient as between the bank and the defendant, it did not enure to the plaintiffs' benefit.

Per MORRISON, J. A., and GALT, J., that the notice given by the bank was sufficient, and the plaintiffs were entitled to rely on it. *Cosgrave et al. v. Boyle*, 458.

This decision has since been reversed by the Supreme Court.

3. *Bill of exchange—Drawn on president of company—Personal liability.*—Section 5 of 16 Vic. ch. 241, gives power to the Midland Railway Co., to become parties to bills, and enacts: "Any bill of exchange drawn, accepted, or endorsed by the president of the company, with the countersignature of the secretary of the company, or any two of the directors of the company, and under the authority of a quorum of a majority of the directors, shall be binding upon the company, and every * * bill of exchange * * accepted * * by the president of the company, or any two of the directors as such, with the countersignature of the secretary, shall be presumed to have been properly * * accepted * * for the company until the contrary

be shewn * * nor shall the president or directors, of the company so * * accepting * * be thereby subjected individually to any liability whatever."

A bill of exchange addressed, "To the President Midland Railway, Port Hope," was accepted as follows: "For the Midland Railway of Canada: accepted; H. Read, secretary; Geo. A. Cox, President," the latter being then the president of the company.

Held, per BURTON, J. A., and OSLER, J., affirming the judgment of the Queen's Bench, 44 U. C. R. 542, that the defendant Cox was personally liable. *Per* PATTERSON and MORRISON, JJ. A., that he was not so liable. *Madden v. Cox*. 473.

4. *Promissory note—Double stamps—42 Vic. ch. 17 sec. 13.*]—The plaintiffs refused to purchase a note from the holder one C., because it was insufficiently stamped, whereupon C. affixed double stamps and transferred it to the plaintiffs, who did not notice that the stamps had not been properly cancelled until some time afterwards, when they at once double stamped it and cancelled the stamps under 42 Vic. ch. 17 sec. 13, D.

Held, reversing the decision of the County Court, that the plaintiffs, having taken the note in the full belief that it had been properly double stamped by C., who was at the time the holder, were entitled to double stamp it under the above section, upon discovering the defect. *Trout et al v. Moulton*, 654.

Authority of husband to sign.]—*See* HUSBAND AND WIFE, 2.

Indorsement by payee after insolvency.]—*See* BANKRUPTCY AND INSOLVENCY, 4.

BILLS OF SALE.

Chattel Mortgage—Subsequent Purchaser—*R. S. O., ch. 119, sec. 10.*]—*Held*, affirming the decision of the County Court, that the subsequent purchasers and mortgagees mentioned in sec. 10 of the Chattel Mortgage Act, R. S. O., ch. 119, are those becoming such after the expiration of a year from the filing of the mortgage.

Where therefore the mortgage was registered in August, 1878, and the plaintiff purchased the property in March, 1879, and the mortgage was not refiled: *Held*, that the plaintiff was not entitled, as against the defendant, who took the property from him in December, 1879. *Hodgins v. Johnson*, 449.

Power of assignee to avoid.]—*See* BANKRUPTCY AND INSOLVENCY, 2.

CHATTEL MORTGAGES.

Power of assignee to avoid.]—*See* BANKRUPTCY AND INSOLVENCY.

See BILLS OF SALE, 2.

CHOSES IN ACTION.

Equitable assignment.]—By the terms of a deed of surrender of a lease of a farm to the plaintiff, the lessee W. was to have the privilege of reaping or selling the fall wheat sown, on payment of the rent in advance, or securing it by 1st of October, 1878. On that date arriving without such payment or security, the plaintiff refused to allow its removal, whereupon W. offered to give plaintiff an order for \$299.85, the amount of rent alleged to be due, on the defendant, a commission merchant to whom W. was accus-

tomed to send his grain for sale, if defendant would accept it. The plaintiff accordingly saw defendant, who said he would accept it if it was all right, and drew up an order in plaintiff's favour, which W. signed. The grain was then shipped to defendant, and sold by him. Before the grain arrived, or at all events before it was sold, W. verbally notified defendant not to pay plaintiff, and the defendant requiring written notice, W. wrote defendant stating that he had found plaintiff's account incorrect, and not to pay plaintiff without further instructions. The defendant thereupon, although expressly notified by the plaintiff's solicitor, that the plaintiff insisted on his right to be paid, paid over the amount of the order to W.

Held, affirming the judgment of the Queen's Bench, that there was a good equitable assignment, and the plaintiff was therefore entitled to recover. *Mitchell v. Goodall*, 164.

COMMISSION AGENT.

Commission agent—Contract made in Ontario—Custom—Evidence of.—*Held*, reversing the decree of BLAKE, V.C., that the evidence, which is fully set out below, clearly established that the plaintiff was acting as a commission agent for defendants, in the purchase of the corn in question at Toledo, and not as vendor on his own account, and that the defendants were not, therefore, justified in refusing to accept a bill for its price, because it was not in good order on its arrival at Belleville, as it appeared that it was purchased and shipped in good condition.

Held, also, that the contract was made in Ontario, and that, therefore,

evidence of the custom of brokers at Toledo was properly rejected. *Williams v. Corbey, et al.* 626.

CONSTITUTIONAL LAW.

Quare, where land is taken under an Act of the Dominion Parliament, whether the finding of the arbitrators can be reviewed under the Statute of Ontario, 38 Vic., ch. 15, O. *Norvall v. Canada Southern Railway Co.*, 13.

See REGISTRATION.

CONTRACT.

Made in Ontario.—See COMMISSION AGENT.

See WORK AND LABOUR.

CORPORATION.

1. *R. W. Co.*—*Action by creditor against shareholder—Proof of allotment.*—The plaintiff, a creditor of a railway company, sued the defendant, as a shareholder therein, for unpaid stock. The defendant had signed the stock book which was headed with an agreement by the subscribers to become stockholders for the amount set opposite their respective names, and upon allotment by the company "of my or our said respective shares," they covenanted to pay the company ten per cent. of the amount of said shares and all further calls. A resolution was subsequently passed by the company instructing their Secretary to issue allotment certificates to each shareholder for the shares held by him. The Secretary accordingly prepared such certificates, the one for the defendant representing that the

company "in accordance with your application for 50 shares," &c., "have allotted you shares amounting to \$5000." These certificates were not sent to the shareholders, but were handed to the company's brokers for delivery to them. The brokers published a notice in a daily paper that these certificates were lying at their office, but did not send written notices to the subscribers. The defendant never called for or received his certificate of allotment and never paid the ten per cent. He swore that he signed upon a verbal agreement with one L., a promoter and a provisional director of the company, that he and another should receive the contract for building the road, which was never awarded to them; and that he never had any notice of the allotment having been made to him. The learned Judge at the trial was unable to say whether the defendant received actual notice of allotment, but found that the company sent notices to him of calls; and that his name was published as a shareholder in a newspaper to which he was a subscriber. The only evidence of the notices being sent to the defendant was the general statement of the Secretary, that he directed notices to be sent ten months after the allotment, to those shareholders likely to pay, that their calls were due.

Held, reversing the judgment of the Queen's Bench, Moss, C.J.A., dissenting, that the defendant was not liable, as the evidence, more fully set out below was not sufficient notice of allotment to him.

Held, also, that if he had received notice of allotment, the fact that the contract was not awarded, as promised, would have formed no defence, as L. had no power to bind the com-

pany by annexing such an agreement to his subscription.

Per BURTON, J. A., that even if a notice of calls were sufficient to prove notice of allotment, the defendant would not have been bound by such a notice received ten months after his subscription. *Nasmith v. Manning*, 126.

This judgment has since been affirmed by the Supreme Court.

2. *Incorporated society—Arbitration of questions arising between members—Expulsion.*—By one of the by-laws of the defendants' association they were empowered to expel any members for refusing to submit a question arising between members to arbitration, but it was provided that such expulsion should take place only after the case should have been submitted to a meeting of the association, due notice having first being given to the parties that such a meeting would be held.

M. & Co., members of the association, had a claim against the plaintiff, who was also a member, consisting of three items \$1.06 for balance of purchase money of grain; \$3.97 for freight on same grain which they had paid under protest, and a sum for costs incurred in an action brought by them to recover back the freight so paid. The plaintiff paid the first item, but disputed the balance of the account, whereupon M. & Co. applied for and obtained a resolution by defendant that there should be an arbitration, to which the plaintiff submitted, and he afterwards admitted his liability for the amount claimed for freight, and offered his note for twelve months for it, which W. & Co. declined. Upon a submission however, being tendered him covering the three items, he refused to sign it as the first two items were no longer

in dispute. In consequence of his refusal, the defendants expelled him at a meeting called "to receive a report from the committee, regarding the conduct of a member."

Held, affirming the decree of Proudfoot, V.C., 27 Gr. 23, that the plaintiff was improperly expelled, and was entitled to be reinstated in his rights of membership.

Per BURTON and PATTERSON, JJ. A., that there had been no refusal to arbitrate within the meaning of the by-law, but only a refusal to arbitrate upon a matter not in dispute.

Per GALT, J., that the notice of the meeting at which the expulsion took place was not a sufficient compliance with the provision which required that the object of the meeting should be specially stated. *Cannon v. The Toronto Corn Exchange*, 268.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.

COSTS.

See APPEAL, MORTGAGE, 2.

COUNTY COURT.

County Court — Jurisdiction.—

The plaintiff sued in the County Court on the *indebitatus* count for \$375, claiming by his particulars:

Balance due from defendant	
to 1st Nov., 1877.....	\$120 00
Wages from 1st Nov., 1877,	
to 1st Nov., 1878	360 00
Less amount paid	160 00
	———— 200 00
	————
	\$320 00

On objection being taken at the trial to the jurisdiction of the County Court, the plaintiff was allowed to amend by striking out all the items except the first.

Held, affirming the judgment of the County Court, that the particulars were no part of the record, which shewed an amount within the jurisdiction of the County Court; but *Held*, also, that judgment for that sum would be a bar to any future action for work done at any time before the commencement of the suit. *Davidson v. The Belleville and North Hastings Railway Company*, 315.

See APPEAL.

CUSTOM.

See WORK AND LABOUR—INSURANCE, 2—COMMISSION AGENT.

DAMAGES.

For breach of warranty on sale of piano.—See WARRANTY.

DECEIT.

Action for, on false notice given under covenant to deliver up possession.—See LANDLORD AND TENANT, 4.

DEEDS.

Mortgage — Rectification — Evidence.—The plaintiffs sought a rectification of the description of the premises covered by a mortgage to them, by including therein the water lots and dock property in front of the lots described in the mortgage. The plaintiffs relied on parol testimony, while the documentary evidence was all in favour of the defendant.

Held, affirming the decree of Spragge, C., 27 Gr. 68, that no case was made for a reformation of the mortgage. *Dominion Loan Society v. Darling*, 576.

DEPARTURE.

To the plea of "non est factum," the plaintiff replied on equitable grounds, alleging that the defendants accepted the deceased's application for insurance, and that the policy was issued and acted upon by all parties as a valid policy, but that the seal was inadvertently omitted to be affixed, and claiming that the defendants should be estopped from setting up the absence of the seal or ordered to affix it.

Held, a good replication and not a departure from the declaration. *Wright v. London Life Insurance Company*, 218.

DISCHARGE.

Omission to keep proper account books.]—See BANKRUPTCY AND INSOLVENCY, 5, 6.

DISTRESS.

Exemption of reaping machine.]—See LANDLORD AND TENANT, 3.

DOUBLE STAMPS.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 4.

EASEMENT.

See LATERAL SUPPORT.

EQUITABLE ASSIGNMENT.

See INSURANCE, 8.—CHOSER IN ACTION.

ESTOPPEL.

By judgment.]—See COUNTY COURT.

See BANKRUPTCY AND INSOLVENCY, 7.

EVIDENCE.

Master's office—Production.]—In an administration suit, where certain creditors produced promissory notes as vouchers for nearly all their claim, the Master, as of course, ordered production of the books and accounts. On appeal, Proudfoot, V. C., held (8 P. R. 86,) that in the first instance (no special cause for investigating the account being made out,) the Master should have accepted as sufficient the offer of the creditors to allow an inspection of the books and accounts at their office.

Held, reversing this decision, that the executors were also entitled to an affidavit identifying the books and accounts as being all in their possession relating to the claim. *Re Ross estate*, 82.

In cases of fraudulent mortgages.]—See BANKRUPTCY AND INSOLVENCY, 1.

Of authority of salesman to warrant.]—See WARRANTY.

See WORK AND LABOUR—DEEDS.

EXECUTION.

Seizure of goods under.]—See INSURANCE, 9.

FALSE REPRESENTATION.

See LANDLORD AND TENANT, 4.

FENCE.

Obligation of R. W. Co., to fence.]
—See RAILWAYS AND RAILWAY COMPANIES

FRAUD.

See LANDLORD AND TENANT, 4.

FRAUDS, STATUTE OF.

Action in respect of agreement for interest in land.]—See LANDLORD AND TENANT, 2.

HUSBAND AND WIFE.

1. *Married Woman — Statute of Limitations.]—Held*, reversing the judgment of the County Court, that notwithstanding R. S. O., ch. 125, sec. 20, a married woman is still entitled, under 21 Jac. I., ch. 16, to bring an action in respect of her separate property within six years after becoming discoverd. *Carroll v. Fitzgerald*, 322.

2. *Promissory note—Per procurator—Authority of husband to sign.]—Upon the insolvency of J. B., who carried on business under the name of B. & Co., his wife purchased the estate from his assignee. The business was continued under the same name, and was entirely managed and controlled by J. B., for his wife, who authorized him by power of attorney to manage the business, and to make promissory notes in and about her said business.*

Being pressed for payment of notes which he had given for a debt due before his insolvency, he gave his creditor notes signed per pro. B. & Co. J. B. Subsequently he was sued on these notes, when he swore they

were his wife's notes, and made with her authority, whereupon the holder sued the wife.

In the action against her she swore that she had separate estate and that she had purchased her husband's estate with it; but, on the advice of her counsel, she declined to give any information concerning it. She swore that J. B. had no authority to give the notes in question, but it appeared that he frequently discussed his own affairs with her, and he would not swear that he did not tell her that he had given these notes.

Held, affirming the judgment of the County Court, that notwithstanding the power of attorney the real scope of J. B.'s agency could be ascertained from any admissible evidence, and that there was sufficient to justify the finding of the learned Judge that J. B. had authority to sign the notes. *Cooper et al v. Blacklock*, 535.

INCENDIARISM.

Omission to disclose threats of.]—See INSURANCE, 8.

INJUNCTION.

Interlocutory injunction—Irreparable injury—Balance of convenience.]—The plaintiff, who claimed the exclusive user of certain streams flowing through his lands, which right the defendant denied, obtained an interlocutory injunction restraining the defendants from using his improvements thereon for floating down their logs, upon the usual undertaking to pay any damages sustained thereby.

Held, reversing the order of PROUDFOOT, V. C., ARMOUR, J., dis-

senting, that the plaintiff was not entitled to an interlocutory injunction, as it was not shewn that irreparable damage would result from refusing it, or that the balance of inconvenience was in his favour.

Remarks as to the general principles on which interlocutory injunctions should be granted or refused. *McLaren v. Caldwell et al.* 363.

2. *Action against vessel owner—Limitation of liability—Injunction restraining proceedings at law.*—The defendant, as administratrix of her husband, who lost his life by the foundering of a steamer called the *Waubuno*, belonging to the plaintiffs, on which he was a passenger, sued the plaintiffs to recover damages under R. S. O. ch. 128.

The plaintiffs, who claimed limited liability under sec. 54 of 25 & 26 Vic. ch. 63, (Imp.) filed a bill under the Merchant Shipping Act 1854, 17 & 18 Vic. ch. 104, sec. 514, (Imp.) to restrain the action, and prayed that it might be determined by the Court whether they were liable for loss of life or merchandise, and, if so, for what amount, and the persons entitled thereto.

Held, reversing the decree of SPRAGGE, C., 27 Gr. 346, that the *Waubuno*, not having been registered under 17 and 18 Vic. ch. 104, (Imp.) was not a British ship within the meaning of the Act, by virtue of the Statute of Canada 36 Vic. ch. 128, and therefore not entitled to take advantage of the limitation clause; and that even if she were, the plaintiffs were not entitled to an injunction, as they did not admit their liability for damages to the extent mentioned in the Act, and bring into Court or offer to secure the amount. *The Georgian Bay Transportation Company v. Fisher*, 383.

INNKEEPER.

Exemption from distress.] — See LANDLORD AND TENANT, 3.

INSURANCE.

1. *Insurance—Uniform Conditions Act, R. S. O. ch. 162—Reasonableness of condition—Non-payment of premium note falling due after loss.*] — Under the statutory conditions endorsed on a mutual fire insurance policy the words, prescribed by sec. 4 of R. S. O., ch. 162, except the heading, "Variations in conditions," were printed in ink of a slightly different colour, but in the same sized type; after certain conditions varying the statutory conditions, and under the heading, "Additional conditions," there was the following condition in type of the same size and colour, "In case any promissory note for a cash premium, or for any premium note * * given to the company, or to any officer or agent thereof, be not paid when due, the policy * * shall be null and void, and the company shall not be liable for any loss occurring either before or after the maturity of such promissory note." The note in this case, payable to defendants' agent or bearer, for \$12, the first payment on the premium undertaking, which was for \$15.62, fell due on the 15th of April, 1878, and the loss, exceeding the amount insured \$500, occurred on the 23rd of March. This note was not paid, the plaintiff alleging that he omitted to pay it, assuming that the defendants would deduct it in settling the loss, which had not been adjusted.

Held, that the Uniform Conditions' Act, R. S. O., ch. 162, (excepting sec. 2.) does not apply to Mutual

Insurance Companies ; but that if it did the condition would have been clearly void for non-compliance with sec. 4 of that Act.

Held, also, reversing the judgment of the Queen's Bench, 44 U. C. R. 70, that the condition was not just or reasonable, as it was required to be by the express contract, and by sec. 35 of the Mutual Insurance Act, R. S. O., ch. 161 ; and that the plaintiff was entitled to recover.

The reasonableness of a condition is to be tested with relation to the circumstances of each case at the time the policy was issued. But *quære*, *per* Moss, C. J. A., whether in the abstract such a condition could be regarded as reasonable, and *per* PATTERSON, J. A., it could not.

Per PATTERSON, J. A., the condition was also unreasonable, because more stringent than the statutory provisions upon the same subject, sec. 48 of the Mutual Act.

Quære, whether this was a note which the company had power to take, or one within the condition. *Ballagh v. The Royal Mutual Fire Insurance Company*, 87.

2. *Reinsurance—Non payment of premium—Custom—Principal and agent.*]—The defendants executed policies, acknowledging the receipt of the premium for reinsurances, which their agent at St. John had accepted, and sent them to him for delivery, but afterwards hearing that a loss had occurred, and that the premiums had never been paid, they instructed him not to deliver the policies. The plaintiff alleged that it was the custom of agents to give each other credit for such premiums, and to settle at the end of the month, when the balance, if any, was handed by one to the other ; but no knowledge

by defendants of such a course or dealing, nor such a course of dealing on the part of their agents, was proved, and it was shewn that their agents had no authority to re-insure, except upon payment of the premium.

Held, affirming the decree of BLAKE, V. C., 26 Gr. 561, that the defendants were not liable.

Held, also, that even if such a custom had been proved to exist between local agents, it would not be binding on the company, unless authorized by it.

Held, also, that the defendants were not under the circumstances bound by their admission on the policy of the receipt of the premium.

Xenos v. Wickham, L. R. 2 H. L. 296, distinguished. *Western Assurance company v. Provincial Insurance company*, 190.

3. *Insurance policy—Want of seal—Estoppel—Departure.*]—The defendant's Act of Incorporation provided that "all policies shall * * be signed * * and being so signed and countersigned and under seal of the Company, shall be deemed valid and binding upon them."

The policy sued on was issued by the Company without the corporate seal being affixed, although the attestation clause stated that the Company had thereunto affixed its seal.

Held, affirming the judgment of the C. P. 29 C. P. 221, that the policy was a valid contract to grant an insurance.

Per Moss, C. J. A., the policy supplied internal evidence of a mutual mistake against which a Court of Equity would, if necessary, relieve. *Wright v. The Sun Mutual Life Insurance Company*, 218.

This decision has since been affirmed by the Supreme Court.

4. This case was similar, except that the statute incorporating the Company provided that "no contract shall be valid unless made under the seal of the Company, and signed * * except the 'interim receipt of the Company.'"

Held, a binding agreement to issue a policy.

Per PATTERSON, J. A., the policy could, if necessary, be construed as an interim receipt.

An agreement to insure may be made by parol. *Wright v. The London Life Assurance Company*, 218.

This decision has since been affirmed by the Supreme Court.

Marine insurance—Re-insurance.]—One B., who was the agent at Montreal, of the plaintiff and defendant Companies, accepted a risk on a vessel of \$7,700 for the defendants, but as the limit prescribed by them on any one vessel was \$5,000 he had to reinsure for \$2,700 and he immediately directed his clerk to write a memorandum of application and acceptance in the books of the plaintiffs for a reinsurance of \$2,700 which was done; but the clerk whose duty it was to endorse the particulars on the open policy issued by the plaintiffs, prepare the certificate, and report the transaction in the daily return, unintentionally omitted to do so, and no notice of the reinsurance was given to the plaintiffs, until after the loss occurred. After they had paid the loss, the plaintiffs discovered the irregularity, and filed a bill to recover the money as paid under a mistake of fact.

Held, affirming the decree of BLAKE, V. C., that the plaintiffs were not entitled to recover, as the application and acceptance of the risk were, under the circumstances, sufficient to constitute a binding con-

tract of reinsurance. *The Canada Fire and Marine Insurance Company v. The Western Assurance Company*, 244.

6. *Insurance—Agent of company filling up application—Misdescription*—It was provided, by one of the conditions in the policy sued on, that if any one should insure his building or goods and cause the same to be described otherwise than they really were, to the prejudice of the company, or should misrepresent or omit to communicate any circumstance which was material to be made known to the company in order to enable them to judge of the risk, such insurance should be void.

The plaintiff signed a printed form of application in blank for an insurance on a block of five buildings, and told defendants' agent to make his own measurements and description. The agent filled up the application from an examination and diagram which he had made on a previous occasion, and in answer to the question: "Is there any other fact or circumstance affecting the risk with which it is necessary that the company should be made acquainted," replied, "No, it is a firstclass building in every respect; although one roof covers all there is a solid brick fire-wall between each store."

The application contained an agreement that if the agent of the company filled up the application, he should, in that case, be the agent of the applicant, and not of the company.

There was not a solid brick wall between the stores, and the jury found that this was a misdescription of a fact material to the risk.

Held, affirming the judgment of the Queen's Bench, 44 U. C. R. 95, that the plaintiff could not recover.

Per BURTON, J. A.—That the clause in the application stating that the agent of the company filling up the application should be regarded as the agent of the applicant was not, by reason of its being made part of the policy, a condition thereof, and subject to the determination of the Judge as to whether it was just and reasonable; and if it were, it was not unreasonable. *Sowden v. The Standard Fire Insurance Company*, 290.

7. *Insurance—Statutory conditions—Arbitration.*—*Held*, affirming the judgment of the Q. B., 44 U. C. R. 501, following *Parsons v. Citizens Ins. Co.*, 4 App. R. 96, and *Parsons v. Queen Ins. Co.*, *Ib.* 103, that a policy issued by the defendants, whose head office was in Montreal, signed by their president there, and countersigned by their local agent in Ontario, where the insured property was situated, was without conditions as the conditions endorsed thereon were not headed either “Statutory” or “Variations.”

The condition by which the defendants sought to defeat the action provided that all disputes touching loss or damage, should, after proof thereof, be submitted to arbitrators to determine the amount, but not the liability, and that an action against the company should not be sustainable until after an award had been obtained fixing the amount, or unless such action should be commenced within twelve months after the loss; and the defendants covenanted, in the body of the policy, to pay the loss within sixty days after the loss should be ascertained and proved in accordance with the terms of the policy.

It appeared that the assured had

furnished the defendants with proof of the loss on the 5th of April, to which the defendants made no objection until the 11th of June following, when they served a written request for an arbitration upon the assured, who refused to arbitrate, and the plaintiff, to whom the claim was assigned, brought this action.

Held, that even if the condition were available as a defence, it had not been broken, as in the absence of a request to arbitrate within the sixty days, the loss must be considered as “ascertained and proved,” and the plaintiff therefore, had a right of action on the expiration of that period. *McIntyre v. The National Insurance Company*, 580.

8. *Fire insurance—Omission to disclose threats of incendiarism—Prior insurance.*—In answer to the question put by one company in an application for insurance on a mill, “Have you any reason to believe that your property is in danger from incendiarism?” and by another, “Have you any reason to suppose that your property is in danger from incendiarism?” the applicant, B., replied to each in the negative.

It appeared that the mill had been burnt some months previously, and that the origin of the fire was unknown; and that threats had been made to B. by one R., an intemperate man, who was accustomed to indulge in threats to which no one paid any attention, to burn down the mill. An anonymous letter had also been received threatening incendiarism. Persons supposed to be tramps had been seen about the premises, and B. had warned the watchman to be careful, and mentioned that he had received the anonymous letter.

Held, reversing the decree of SPRAGGE, C., 27 Chy. 121, that the answers were such a misrepresentation as avoided the policy.

Held, also, that upon the evidence, set out below, the policies were also avoided by the non-disclosure of a previous insurance.

Held, also, that the usual covenant to insure contained in a mortgage executed under the Act respecting Short Forms of Mortgages, operates as an equitable assignment of the insurance when effected. *Greet v. Citizens Ins. Co. Greet v. Royal Ins. Co.* 596.

The question put by the company in this case was, "Is there any incendiary danger threatened or apprehended?" which B. answered in the negative.

Held, affirming the decree of SPRAGGE, C., 27 Chy. 121, a misrepresentation, which avoided the policy. *Greet v. Mercantile Ins. Co.* 596.

9. *Fire insurance—Seizure of goods under execution—Condition of forfeiture of policy therefor—Construction and validity thereof.*—By an additional condition of a policy of insurance it was provided that if the insured property should be levied upon, or taken into possession or custody under any legal process, or the title should be disputed in any proceeding in law or equity, the policy should cease to be binding upon the company.

After the insurance was effected an execution issued against the goods of the insured, under which the bailiff made a formal seizure, but did not deprive the insured of their possession, and upon a bond being given a day or two afterwards, the seizure was withdrawn.

The Court of Common Pleas held that this was a valid seizure, and that the plaintiff, who was mortgagee of the goods and to whom the loss was payable, could not therefore recover.

Held, reversing this judgment, that the plaintiff was entitled to recover.

Per BURTON, PATTERSON, and MORRISON, J.J.A., that there had not been a seizure within the meaning of the condition, which refers to an actual custody and change of possession.

Per ARMOUR, J., that the condition was not binding on the insured, as it was not printed in compliance with R. S. O. ch. 162, sec. 4.

Wilson v. The Standard Fire Ins. Co., 29 C. P. 308, followed and approved of.

Semble, *per* PATTERSON, J.A., that the condition was void, as being unjust and unreasonable.

Remarks by PATTERSON, J. A., as to the principle and consideration upon which the validity of a variation of or addition to the statutory conditions should be tested and determined. *May v. The Standard Fire Ins. Co.* 605.

LANDLORD AND TENANT.

1. *Landlord and tenant—Rent to be refunded in case of fire—Cesser of term*—A lease of a mill, and ten acres of land adjoining, for five years at the rent of \$500 for the first year and \$550 for each of the four succeeding years, payable half-yearly in advance, contained the usual covenants and provisions amongst which was the covenant to pay rent, without any exception as to fire, and to keep in repair, accidents by fire excepted;

and the lease concluded with the following clause:—"Should the mill be rendered incapable by any fire, or tempest, then the portion of rent for the unexpired portion of the term paid for in advance, to be refunded by the lessor to the lessee," but there was no provision in such event for the cesser of the term.

Held, BURTON, J. A., dissenting, reversing the judgment of the County Court, that the effect of the whole instrument was, that the destruction of the premises by fire, not merely gave a right to a return of a proportionate part of the current half-year's rent, but put an end to the whole term, and therefore that the lessor was not entitled to recover rent for the half year succeeding such destruction. *Agar v. Stokes*, 180.

2. *Landlord and tenant—Action for refusing to give possession—Statute of Frauds.*]—The plaintiff sued defendant for damages for refusing to give him possession of premises which the plaintiff alleged that defendant had verbally agreed to give him a lease of for sixteen months.

Held, affirming the judgment of the County Court, that the evidence did not show an actual letting, but that even if it did the plaintiff must fail under the fourth section of the Statute of Frauds, as the action was brought in respect of an agreement for an interest in land. *Moore v. Kay*, 261.

3. *Distress—Goods in the way of trade—Exemption—Reaping machine.*]—The defendant distrained for rent a reaping machine on premises leased by him to one G., from whom the plaintiff, a hotel keeper, had the use of the yard and stable. The machine had been left at the plaintiff's hotel about six months before by one R., an agent

for the sale of reaping machines, when he was stopping there, and R. had never been at the hotel since, except perhaps on one occasion. The plaintiff was paid nothing for keeping the machine, nor did he assume any responsibility therefor.

At the trial it was sought to prove that it was essential to the plaintiff's business to receive and keep such machines brought by his customers, but the evidence merely shewed that a refusal to do so would or might render his hotel less popular.

Held, reversing the judgment of the County Court, that the machine was not exempt from distress. *Mitchell v. Coffee*, 525.

4. *Landlord and tenant—Covenant to deliver up possession on notice of sale—False notice—Action for.*]—By a covenant in a lease of a farm from defendant to the plaintiff, it was provided that upon receiving six months notice from the lessor that he had sold the farm, and upon receiving compensation for all labour up to the date of the notice, from which he had derived no return, the lessee would deliver up possession at the end of six months, the compensation being duly paid. Defendant served the plaintiff with a notice that he had sold the farm, in consequence of which the plaintiff desisted from putting in crops, and other work for which he had made preparation, and rented another farm. Upon ascertaining that the notice was untrue, the plaintiff refused to give up possession, and sued the defendant for false representation.

Held, reversing the judgment of the Q. B. 45, U. C. R. 94 that the plaintiff was entitled to recover the damages sustained by him in consequence of the notice. *Cowling v. Dickson*, 549.

LATERAL SUPPORT.

Lateral support—Implied reservation of—Easement—Unity of seizin—Negligence.]—The plaintiff, tenant for years of the defendant S., sued for loss of use of a tenement in consequence of the fall of the wall thereof, which was caused by the excavation of the adjoining lot for a cellar by the defendant H. who owned it. H. had excavated his land in some places to within a few inches of the dividing line, close to which the house in question stood. This house had been built by S. in 1854, when he had a lease of the lot for ten years, which gave him the right to remove it at the expiration of the term, upon oak planks laid about one foot under the ground. In 1856, however, he acquired the fee, and in 1870, he also became owner of the lot now owned by H., and held it for a year, when he conveyed it to E. H. from whom H. derived title. There was no evidence to shew that H. knew that the house was receiving more support from his land than it would have required if it had been constructed in the ordinary way.

Held, that owing to the unity of seizin of S., there had not been twenty years continuous enjoyment of the support as an easement; but that even if there had been, no such acquiescence in the use of the servient tenement had been shewn as to justify the presumption that an easement had been acquired by grant.

Held, also, that when S. sold H.'s lot, there was no implied reservation of the right of support for the house.

Held, also, reversing the judgment of the Queen's Bench, 44 U. C. R. 428, that under the circumstances there was no evidence of negligence in fact, and that the plaintiff was therefore not entitled to recover. *Backus v. Smith et al*, 341.

STATUTE OF LIMITATIONS.

Statute of Limitations.]—In order to obtain convenient access to the upper rooms of their house the plaintiffs constructed a wooden platform, stairway and landing, on the outside of the house on the defendant's land. This structure was composed of planks laid upon blocks or scantling resting upon the ground, but the head of the stairs was supported upon posts which rested upon the ground. The platform and stairway were open to every one, including the defendant, and there was no bar or gate to prevent defendant from entering on his property. The defendant took no proceedings against the plaintiffs until the expiration of ten years.

Held, reversing the decree of Spragge, C. 26, Gr. 503, that the plaintiffs had not such possession of the land covered by the structure as by force of the Statute of Limitations to vest in them a title in fee simple; but that even if the statute had commenced to run it was stopped by the fact, as stated in the evidence, that during the ten years the defendant had temporarily taken up the platform, and used the land for his own purposes.

It was *held* on the evidence that this was not shewn to have been done by the plaintiffs' permission; but *Quære*, per PATTERSON, J. A., whether if it had been it would not still have interrupted the operation of the statute. *Griffith et al. v. Brown*, 303.

Married women—Right to sue six years after becoming discoverd.]—See HUSBAND AND WIFE, 1.

MALICIOUS PROSECUTION.

Malicious arrest—Reasonable and probable cause—Variance.]—The

declaration alleged that the defendant laid an information that certain harness had been stolen by the plaintiff, whereas the information proved was qualified by the addition of the words "as he supposed."

Held, affirming the judgment of the County Court, no variance.

It was shown that the information was laid by the defendant on the advice of the magistrate, and that he did not interfere in the issue of the warrant for the plaintiff's arrest, but it was proved that the information contained the substance of the statements made by the defendant, which justified the warrant.

Held, there being an absence of reasonable and probable cause, that the defendant was liable. *Colbert v. Hicks*, 571.

MORTGAGE.

1. *Mortgage—Discharge by surviving mortgagee.*]—The registration of a certificate given by the survivor of several mortgagees, upon payment in money of the mortgage debt, effectually discharges the mortgage, and reverts the legal estate.

C. executed two mortgages in favour of M. B. and her two sisters, for moneys advanced by them, which were duly registered. He afterwards sold portions of the land to D. and E., giving them his covenant against incumbrances. Subsequently, and after the death of the two sisters, C. procured M. B. to execute discharges of these mortgages, giving her instead a mortgage on other lands of ample value, by way of security, and after the registration of these discharges he sold the rest of the land comprised in the original mortgages to others. These purchasers took in good faith for value, having no actual

notice of the two original mortgages. C. afterwards induced M. B. to accept in lieu of this mortgage which she discharged, a mortgage upon other lands which proved almost worthless. Upon the death of M. B., the personal representative of herself and her sisters filed a bill seeking to charge the land embraced in the original mortgages with the amount remaining due thereon.

Held, reversing the decree of Blake, V. C., 26 Gr. 99, that the discharges by M. B. were valid and effectual, so far as the purchasers, after they had been registered, were concerned, as when they received their conveyances and paid the consideration therefor, a discharge by M. B., the person entitled by law to receive the money was registered, and they were not bound to enquire whether payment in money had been actually made; but that the discharges were inoperative in favour of C. and of D. and E. who purchased from him with notice of the mortgage by reason of the registry, to extinguish the interest of the deceased sisters other than M. B., as she could only discharge the mortgages upon payment of the debt, and not by acceptance of another security. *Dilke v. Douglas et al*, 63.

2. *Mortgage—Agreement to postpone—Non-disclosure of.*]—The plaintiff, being about to advance money to W. M. on property on which J. M. had a mortgage, J. M. executed an agreement that the proposed mortgage to plaintiff should have priority over his. Ten years afterwards J. M. assigned his mortgage to the Quebec Bank, to secure acceptances on which he was liable, which assignment was registered, and superseded the agreement, which had never been registered, and the existence of

which J. M. had not mentioned to the bank.

The plaintiff filed a bill against the executors of W. M., the Quebec Bank, and J. M., asking for a sale of the land; payment of any deficiency by the executors, and that J. M. might be ordered to make good any loss by reason of the assignment of his mortgage.

Held, reversing the decree of SPRAGGE, C., 26 Gr. 280, that the plaintiff was entitled to a decree against J. M. for payment of the mortgage money, in the meantime retaining his position as a subsequent incumbrancer; but, BLAKE, V. C., dissenting, that the Court could not, at the instance of a subsequent incumbrancer who did not ask to redeem, order a sale of the property in opposition to the wishes of the bank.

Held, also, BLAKE, V. C., dissenting, that under the circumstances, neither the plaintiff nor J. M. were entitled to costs, either in this Court or the Court below.

Per BLAKE, V. C.—That the litigation was caused by J. M., and the costs should be borne by him. *Campbell v. McDougall et al*, 503.

This case has been argued before the Supreme Court and stands for judgment.

Reformation of.]—*See* DEEDS.

NEGLIGENCE.

Negligence—Liability of valuator for.]—The defendant, who was employed on behalf of the plaintiff to value certain lands, intended to certify the value at \$2000, but through the fraud of the agent he was induced to certify for \$3000.

Held, affirming the decree of BLAKE V.C., 26 Gr. 390, that the defendant was not liable for any loss sustained by the plaintiff.

Held, also, that the circumstances of this case would not justify the Court in reversing the finding of the Judge of first instance, that the valuation was made without fraud or intention to deceive.

Per BURTON, J.A.—A valuator is not liable for negligence in making a valuation of land, on which a loan is procured, unless it be fraudulently made. *Silverthorn v. Hunter et al*. 157.

See LATERAL SUPPORT.

NEW TRIAL.

On matter of discretion.]—*See* APPEAL.

See WARRANTY.

PLEADING.

See DEPARTURE.

PRINCIPAL AND AGENT.

Authority of salesman to warrant.]

—*See* WARRANTY.

Promissory note—Authority of husband to sign for wife.]—*See* HUSBAND AND WIFE, 2.

PRODUCTION.

See EVIDENCE.

PUBLIC SCHOOLS.

School trustees—Change of school site—Specific performance.]—*Held*, affirming the decree of PROUDFOOT, V.C., that the board of education formed by the union of high school and public school trustees, had power to change the site for a school, and purchase another without a by-law or resolution of the county

council, or the approval of the Lieutenant-Governor in council, and that the plaintiff was entitled to specific performance of an agreement by the Board to purchase land for such purpose. *Moffatt v. Board of Education of Carleton Place*, 197.

RAILWAYS AND RAILWAY COMPANIES.

Railway Co.—Obligation to fence—*C. S. C. ch. 66.*]—The plaintiff sued the defendants for the loss of certain cattle which had escaped to their road by reason, as he alleged, of the neglect of the company to fence, and were killed by their train.

It appeared that the plaintiff owned land on either side of the defendants' railway, but the Toronto, Grey, and Bruce R. W., which lay to the north of defendants' railway, and had also been taken from his farm, ran between his land and defendants' railway.

Held, upon the facts stated below that there was no evidence that the cattle had reached the railway from from the south side; and the fact that the Toronto, Grey, and Bruce R. W. Co. had neglected to fence did not give the plaintiff, in respect of the occupation of their land by his cattle, the statute of that company for the time, as adjoining proprietors, against whom only the defendants were bound to fence, so as to make the defendants liable. *Douglass v. The Grand Trunk R. W. Co.* 585.

REGISTRATION.

Registrar—Excess of fees under R. S. O. ch. 111—Action for.]—The plaintiffs sued the defendant for the

proportion of fees received by the defendant as registrar, to which they were entitled under R. S. O. ch. 111 secs. 98 to 103. The defendant demurred to the declaration on the ground that these sections were *ultra vires* of the Local Legislature, as they imposed an indirect tax, and not a tax for raising a revenue for provincial purposes.

Held, affirming the judgment of Armour, J., that having received the money in question under the above Act, the defendant could not deny that he received it for the purposes therein provided.

Held, also, that if a tax at all, it was clearly a direct tax, and *intra vires*. *The County of Hastings v. Ponton*, 543.

SALE OF GOODS.

See COMMISSION AGENT.

SALE OF LANDS.

See LANDLORD AND TENANT, 2.

SHIPS AND SHIPPING.

See INJUNCTION, 2.

SPECIFIC PERFORMANCE.

Of award.]—*See* ARBITRATION AND AWARD, 2.

See PUBLIC SCHOOLS.

STAMPS.

Double.]—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES, 4.

STATUTES.

16 Vic. ch. 241 sec. 5.]—*See* **BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.**

17 & 18 Vic. ch. 104 sec. 514, Imp.]—*See* **INJUNCTION, 2.**

25 & 26 Vic. ch. 63 sec. 54, Imp.]—*See* **INJUNCTION, 2.**

36 Vic. ch. 128, D.]—*See* **INJUNCTION, 2.**

37 Vic. ch. 47 sec. 1, D.]—*See* **BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.**

38 Vic. ch. 15.]—*See* **CONSTITUTIONAL LAW.**

42 Vic. ch. 17 sec. 13.]—*See* **BILLS OF EXCHANGE AND PROMISSORY NOTES, 4.**

C. S. C. ch. 66.]—*See* **RAILWAYS AND RAILWAY COMPANIES.**

R. S. O. ch. 111.]—*See* **REGISTRATION.**

R. S. O. ch. 119 sec. 10.]—*See* **BILLS OF SALE.**

R. S. O. ch. 125 sec. 20.]—*See* **HUSBAND AND WIFE, 1.**

R. S. O. ch. 128.]—*See* **INJUNCTION, 2.**

R. S. O. ch. 161 sec. 35.]—*See* **INSURANCE, 1.**

R. S. O. ch. 162 sec. 4.]—*See* **INSURANCE, 1.**

THREATS.

Of Incendiarism.]—*See* **INSURANCE, 8.**

VALUATOR.

Liability of — Negligence.]—*See* **NEGLIGENCE.**

WALL.

See **LATERAL SUPPORT.**

WARRANTY.

Warranty on sale of piano—Parol evidence of authority of salesman to

warrant—Damages.]—The plaintiff sued the defendant, a piano maker, for breach of a warranty given by his salesman on the sale of a piano, that the instrument was then sound and in good order. The plaintiff signed the ordinary receipt note, which is set out below, providing for payment of the price, and that until paid the property should remain in defendant, in which there was no mention of the warranty.

Held, that parol evidence of the warranty was admissible, as it was apparent that the receipt note was not intended to be the evidence of the whole contract.

Quære, whether this question should not have been left to the jury.

Held, also, that the salesman had authority to give the warranty.

Quære, whether any evidence of an express warranty was necessary.

Held, also, that the proper measure of damages to allow was the price which at the time of sale would have been required to remove the alleged defect, and the jury having given much more, the Court named a sum to which the plaintiff might reduce his verdict, or that there should be a new trial. *McMullen v. Williams*, 518.

WATER.

Right to float logs.]—*See* **INJUNCTION, 1.**

WATER COURSES.

See **INJUNCTION, 1.**

WORK AND LABOUR.

Entire contract — Custom.—The defendant agreed with the plaintiffs to sink an artesian well at seventy-five cents a foot. After sinking a distance of one hundred and sixty feet, he met with an impediment, and refused to proceed further.

Held, reversing the decision of the

County Court, that he was entitled to be paid for the work done, as the evidence did not shew an agreement that he should receive nothing unless he succeeded in finding water.

Quære, whether evidence as to how contracts for artesian wells were usually made in Barrie should have been received. *The Barrie Gas Co., v. Sullivan*, 110.

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